The Moral Exception in Trade Policy

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I. INTRODUCTION

The clash between trade and morality continues to rattle international economic relations. At issue is whether trade restrictions may be used to promote moral goals. An important consideration in this debate is whether morality-driven trade measures conflict

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with international trade rules. The General Agreement on Tariffs and Trade (GATT) contains an exception to its rules prohibiting trade restrictions for measures "necessary to protect public morals."[1] Yet, over 50 years after it was written, this exception remains uncharted in trade jurisprudence.[2]

The purpose of this Article is to explore the meaning and potential use of GATT article XX(a). The following discussion introduces the issue. Part II interprets article XX(a). Part III considers how the GATT moral exception might be implemented in practice. Part IV briefly examines the moral exception in other WTO agreements. Part V concludes.

A. *Analyzing the Trade and Morals Linkage*

Questions of morality are implicated in numerous contemporary policy debates.[3] Should trade to pariah regimes like Serbia or Cuba be embargoed?[4] Should international traffic in products made by child labor be halted? Should local morals be able to trump economic globalization? Should international morals be able to trump the exercise of power by local elites?

Policymakers trying to answer these questions will want to examine the potential effectiveness of trade measures[5] as well as their legality under international trade rules. Assessing effective-

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX(a), 55 U.N.T.S. 188, 262 [hereinafter GATT]. The GATT is an international agreement that establishes rules for government trade policy. In 1995, the GATT was absorbed within the new World Trade Organization (WTO). The GATT is now one of several agreements enforced by the WTO. *See* WORLD TRADE ORGANIZATION, 1 GUIDE TO GATT LAW AND PRACTICE 8 (1995) [hereinafter GUIDE TO GATT LAW].

2. The absence of caselaw on article XX(a) can be seen in EDMOND MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY 400 (1986).

3. *See* Gerald F. Seib, *Washington Meets a Moral Matter That Does Count,* WALL ST. J., Feb. 4, 1998, at A24; Bruce Fein, *Minke endangering free trade?,* WASH. TIMES, Mar. 15, 1995, at A18, *available in* LEXIS, News Library, Arcnws File (expressing concern that foreign nations might embargo U.S. exports based on ethical concerns about animal slaughter methods, animal testing, and genetic engineering).

4. During his visit to Cuba, Pope John Paul II called the U.S. embargo against Cuba "ethically unacceptable." Jack Kelly & Carol Morello, *Pope leaves Cubans with hope for "libertad"—Pontiff's words energize crowd at final mass,* USA TODAY, Jan. 26, 1998, at 11A.

5. Trade measures include the use of an import or export ban, a quota, a tariff or a discriminatory government procurement policy. Trade measures can be distinguished from domestic regulations or taxes that apply to domestically produced and consumed goods. *See* Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration, in* 2 FAIR TRADE AND HARMONIZATION 21, 23–30 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

ness requires a specification of the moral goal—for example, to prevent the abuse of young children. Once the goal is specified, an important variable will be the number of states involved. Multilateral action will probably be more effective if the goal is to change behavior. With unilateral action, the potential usefulness of a trade measure can be undercut through trade diversion. As one political scientist explained, "[a] single state may adopt what it deems to be effective measures to combat certain evils, only to find that its policies are largely defeated by the failure of neighboring states to adopt similar measures."[6]

International trade law comes into the analysis in two ways. First, if a morally-motivated trade measure violates international trade rules, then employing it anyway undermines the rule of law and subverts values that may be dear to the country contemplating a trade measure. Second, if the trade measure is adjudged a violation of the GATT, then the target country might retaliate if the measure is not repealed.[7] This could raise costs to the originating country and could change the expected value of using the trade measure. Thus, being able to predict whether an import ban for moral purposes will violate trade law is a critical factor in the overall analysis.

Policymakers may also want to consider the morality of interfering with consensual exchange. As Robert W. McGee has reminded us, "any kind of trade restriction violates someone's rights."[8] Thus, the moral gain achieved by prohibiting certain

6. EDMUND C. MOWER, INTERNATIONAL GOVERNMENT 483 (1931). *See also* Leo Abruzzese, *Sanctions: Foreign policy on the cheap*, J. COM., Jan. 9, 1998, at 7A, *available in* LEXIS, News Library, Curnws File (critiquing the overuse of U.S. unilateral economic sanctions, but suggesting that when sanctions are used, they should permit humanitarian exceptions).

7. If a WTO member government believes that another government has violated GATT rules, it may lodge a complaint in the WTO's dispute settlement mechanism. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3, 33 I.L.M. 1226. A panel of three will be appointed to consider the dispute and render a decision. *Id.* art. 8. This decision can be appealed to the Appellate Body. *Id.* art. 17. A decision of a panel or the Appellate Body is adopted automatically unless WTO members decide by consensus not to adopt it. *Id.* arts. 16.4, 17.14. A decision that finds a legal violation will recommend that the defendant government bring the measure into conformity with the applicable WTO agreement. *Id.* art. 19.1. If that is not done, the plaintiff government may take countermeasures of an equivalent value. *Id.* art. 22.

8. Robert W. McGee, *The Moral Case for Free Trade*, 29 J. WORLD TRADE, Feb. 1995, at 69, 75. McGee concludes that the only moral choice is to abolish laws that violate rights. *Id.* For a contrasting perspective reviewing theories of when market outcomes may not be preferable, see Jane B. Baron & Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996).

transactions (e.g., the purchase of pornography) needs to be balanced against the moral loss caused by denying freedom.

There are several ways that morally-based trade restrictions can be employed. First, they may seek to "protect" the morality of the individual engaged in the trade. For example, sale of liquor from A to B can be halted to protect the buyer B's morality (or seller A's morality). Second, trade restrictions can be used to safeguard the morality of a participant in production. Thus, photos of a child C might be banned in international trade in order to protect C even though A and B want to trade the photos. Third, trade restrictions can be used to give moral support to a class of individuals. For example, Country E might ban trade with Country F as a means of protest against immoral acts by F's government against citizens of F.

B. *Scope of this Study*

This Article focuses only on the legal issue of whether using a morality-motivated trade measure violates the GATT or other rules of the World Trade Organization (WTO).[9] Thus, the Article does not examine the likely impact of such measures on target activities.[10] Nor does it consider the psychological benefits to the polity employing the trade measure of "doing something," even though this act might not have any tangible impact.

Trade measures tend to have multiple purposes. For example, a ban on trade in endangered species is primarily motivated by environmental concerns. A ban on trade with Haiti is primarily motivated by political concerns. Nevertheless, there may be a moral component to both trade bans.

The moral exception is only one of many established exceptions to the GATT regime. As a result, this Article will focus only on those trade measures that cannot be easily justified by any other GATT exception. For example, the large category of environmental measures will not be discussed here because GATT article XX(b) applies to human, animal or plant life or health and article XX(g) applies to exhaustible natural resources.[11] Import bans of

9. Agreement Establishing the World Trade Organization, *opened for signature* Apr. 15, 1994, 33 I.L.M. 1144.

10. A sanction may also miss its target. *See* Speech by Hugo Paemen, "Sanctions and Trade Embargoes," *in* BANKER'S ASSOCIATION OF FOREIGN TRADE, 15TH ANNUAL MIDWINTER CONFERENCE 3 (Jan. 22, 1998).

11. GATT, *supra* note 1, arts. XX(b), XX(g); DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 46–51 (1994).

convict-made goods will not be discussed here because GATT article XX(e) applies to the products of prison labor.[12] Trade bans relating to culture will not be discussed because GATT article XX(f) applies to national treasures of artistic, historic, or archaeological value.[13] Trade controls mandated by the U.N. Security Council will not be discussed because GATT article XXI provides an exception for actions taken in pursuit of obligations under the U.N. Charter.[14] Finally, contemporary export controls on arms and nuclear material will not be discussed because GATT article XXI also provides an exception for actions "relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods ... for the purpose of supplying a military establishment."[15]

In focusing only on trade measures used for moral purposes, this Article does not look at other economic tools. For example, a government can employ measures such as freezing bank accounts, opposing World Bank loans, forbidding foreign investment, restricting air landing rights, or reducing foreign aid. Policymakers considering the use of a trade measure might evaluate it in conjunction with alternative economic instruments.

The final clarification is that we will look mainly at international trade rules. There is some soft international law regarding economic coercion. For example, the U.N. General Assembly has declared that "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."[16] This principle will not be examined here. We will

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12. *See, e.g.*, Christopher S. Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INT'L L. & POL. 19 (1975) (discussing legislative history of this provision, its GATT implications, and policy considerations in implementation).

13. *See* Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL'Y 751, 789–90 (1994).

14. GATT, *supra* note 1, art. XXI(c).

15. *Id.* art. XXI(b)(ii). This exception applies insofar as the party taking the action considers it "necessary for the protection of its essential security interests"—a rather loose test. *See id.* art. XXI(b); *see generally* Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1, 8-20 (1997) (discussing this provision).

16. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131(XX) para. 2, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965). *See Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX) art. 32, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, 55, U.N. Doc. A/9631 (1974); *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance*

also not discuss the WTO-legality of morality-based trade measures in conventional international law. That is, a trade measure taken pursuant to a multilateral narcotics treaty might be deemed consistent with the GATT even though the identical measure taken outside the umbrella of the treaty might be viewed as GATT-inconsistent. Instead, this Article will examine the applicability of GATT article XX(a) to measures carried out by governments acting alone.

II. INTERPRETING GATT ARTICLE XX(a)

The GATT is an international agreement that establishes rules for government trade policy.[17] There are three core GATT disciplines. Article I requires "most-favoured-nation treatment" among GATT member governments.[18] This means that trade treatment cannot discriminate according to the country of origin or destination. Article III requires "national treatment."[19] This means that imported products cannot be treated less favorably than domestic products. Article XI forbids quantitative restrictions, such as quotas, import bans, and export bans.[20] Article XX contains "General Exceptions" to these rules and to other GATT rules.

GATT article XX(a) provides an exception from GATT rules for the "protection of public morals."[21] The vagueness of this provision gives rise to two central questions. First, *what* type of behavior implicates public morals? Is heroin use a matter of public morals? How about alcohol or cigarette use? Can public morals differ from one country to another, or is there a uniform international standard? Second, *whose* morals can be protected? It seems clear that a government can use a trade measure to protect a state's own population. But can a trade measure be used to protect morals elsewhere? For example, would an import ban against goods made by indentured children be GATT-legal?

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with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (1970); *see also* George N. Barrie, *AGORA: Is the ASIL Policy on Divestment in Violation of International Law? Further Observations*, 82 AM. J. INT'L L. 311, 313 (1988) (suggesting that economic coercion that intentionally interferes with the trading patterns of a state that has committed no offense against the instigating government is illegal under international law).

17. *See generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969).

18. GATT, *supra* note 1, art. I.

19. *Id.* art. III.

20. *Id.* art. XI. This article also contains a number of exceptions not relevant here.

21. *Id.* art. XX(a).

In beginning to answer these questions, it will be helpful to clarify a few terms. This Article will employ the term "outwardly-directed" in order to describe trade measures used to protect the morals of foreigners residing outside one's own country. [22] Conversely, trade measures used to protect morals of persons in one's own country will be described as "inwardly-directed." Other terms that have been employed to describe laws that seek to promote values in foreign countries are "extrajurisdictional" and "extraterritorial."[23]

Of course, the terms "outwardly-directed" and "inwardly-directed" are somewhat arbitrary because there are two sides to a transaction. For example, suppose a government bans imports made by indentured children.[24] This Article characterizes such a ban as outwardly-directed. But this ban might also be characterized as inwardly-directed to prevent domestic consumers from suffering a moral taint from serving as a market for such products.[25] Similarly, one might view a ban on the importation of pornography as either inwardly-directed (to safeguard the morality of viewers) or outwardly-directed (to safeguard the morality of the producers).

Trade measures are used for many inwardly-directed moral purposes. For example, the government of Israel bans the importation of non-kosher meat products.[26] The U.S. government bans the importation of "obscene" pictures.[27] This ban is one of many

22. Robert Hudec uses the term "externally-directed" for the same phenomenon. *See* Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION, *supra* note 5, at 116.

23. *See* United States—Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155, 199 ¶ 5.28 (extrajurisdictional), 175 para. 3.47 (extraterritorial) (1993) [hereinafter Tuna-Dolphin I]; *see also* Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 280 (1997) (discussing extraterritorial and extrajurisdictional actions involved in the Tuna-Dolphin cases).

24. Indentured children are children engaged in bonded labor. For a discussion, see INTERNATIONAL LABOUR OFFICE, CHILD LABOUR: TARGETING THE INTOLERABLE 15 (1996).

25. Economists have tagged this a transnational psychological externality. For example, a denizen of Country A feels bad about the existence of slavery in Country B. *See* Richard Blackhurst & Arvind Subramanian, *Promoting multilateral cooperation on the environment*, *in* THE GREENING OF WORLD TRADE ISSUES 247 (Kym Anderson & Richard Blackhurst eds., 1992).

26. *US queries Israel on pistachio imports; Alleged illegal trade with Iran may be harming US exports*, J. COM., Apr. 1, 1997, at 1A, *available in* LEXIS, News Library, Curnws File.

27. 19 U.S.C. § 1305(a) (1994). *See* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).

import bans in Section 305 ("Immoral articles–Importation prohibited") of the Hawley-Smoot Tariff Act of 1930.[28]

A more complex import ban is the U.S. law forbidding interstate commerce of human organs (for valuable consideration) for use in human transplantation.[29] Without such a law, Americans needing kidneys or livers might be able to purchase them from foreign sources. The law prevents an immoral market for organs within the United States and, thus, is inwardly-directed. It may also protect foreign persons from being chopped up, and, to that extent, is outwardly-directed.

Export bans can also be used to pursue inwardly-directed purposes. For example, the government of Thailand bans the exportation of Buddha images.[30] This is inwardly-directed because the government is safeguarding the moral and religious sensibilities of its citizens by keeping Buddhas out of foreign hands.

One outwardly-directed moral purpose of trade measures is to protect foreign workers. For example, in 1997, the U.S. Congress forbade border officials from allowing importation of products made by forced or indentured child labor.[31] A U.S. law has long banned the importation of products made by convict labor, forced labor and indentured labor under penal sanction,[32] but it was not clear to Congress in 1997 whether this old law applied to products made by indentured children.[33] The new U.S. trade measure is not

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28. Tariff Act of 1930, June 17, 1930, § 305(a), 46 Stat. 590, 688, *codified at* 19 U.S.C. § 1305(a) (1994).

29. 42 U.S.C.A. § 274e(a) (1991); 21 U.S.C.A. § 321(b) (1972) ("interstate commerce" includes commerce with foreign nations); John J. Goldman, *Arrests shed light on illicit trade in human body parts, activists say,* L.A. TIMES, Feb. 25, 1998, at 4, *available in* LEXIS, News Library, Curnws File.

30. Jennifer Merin, *Customs Prevail: Know rules when bringing foreign treasures home,* CHI. TRIB., Apr. 14, 1996, at Travel–4.

31. Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105–61, § 634, 111 Stat. 1272, 1316 (1997). The law is written as an appropriations rider:

> None of the funds made available in this Act for the United States Customs Service may be used to allow the importation into the United States of any good, ware, article, or merchandise mined, produced, or manufactured by forced or indentured child labor, as determined pursuant to section 307 of the Tariff Act of 1930.

Id. The meaning of "as determined" is unclear. If the Customs Service determines that goods made by indentured labor are *not* prohibited under section 307, then the rider may not forbid admitting such goods. Note also that the rider presumes that Customs agents are employed to admit products rather than to keep them out.

32. 19 U.S.C. § 1307 (1994).

33. *See* Tim Shorrock, *Customs walks tightrope on new child labor law,* J. COM., Oct. 14, 1997, at 1A, *available in* LEXIS, News Library, Curnws File.

covered by the exception in GATT article XX(e) because it applies only to the products of prison labor.[34]

Other morality-based trade bans focus on animal welfare. For example, in 1983, the European Commission barred the importation of skins of certain seal pups because of public outrage at the killing of baby seals by Canadians.[35] Some animal welfare bans are linked to the method of production. For example, the Commission has forbidden the importation of animal pelts unless the country of origin has banned leghold traps or unless the trapping methods used for the species meet "internationally agreed humane trapping standards."[36] U.S. law forbids the importation of meat products unless the livestock from which they were produced was slaughtered in accordance with U.S. statutory requirements.[37] Among these requirements is that the slaughtering be "humane."[38] The U.S. Marine Mammal Protection Act bans the importation of any marine mammal if such mammal is captured in a manner the Secretary of Commerce deems inhumane.[39]

Other morality-based trade bans are linked to the method of transportation. For example, since 1949, U.S. law has prohibited the importation of any wild animal or bird "under inhumane or unhealthful conditions."[40] The Convention on International Trade in Endangered Species of Wild Fauna and Flora directs exporting nations to "minimize the risk of injury, damage to health or cruel treatment" to animals.[41] Recently, non-governmental organiza-

34. *See* Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 682, 688–89 (1997).

35. Ludwig Krämer, *Environmental Protection and Trade—The Contribution of the European Union, in* ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS? 413, 439–40 (Rüdiger Wolfrum ed., 1996); Boris Johnson & Greg Neale, *EC to lift ban on seal skin imports—Now culling will resume, warn animal activists*, SUNDAY TELEGRAPH, Nov. 21, 1993, at 2, *available in* LEXIS, News Library, Arcnws File.

36. Council Decision 97/602, 1997 O.J. (L 242); Commission Regulation 3254/91, art. 3, 1991 O.J. (L 308). *See generally* Gillian Dale, Comment, *The European Union's Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict with International Trade*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 441 (1996) (providing background on the import ban).

37. 21 U.S.C. § 620(a) (1972).

38. 7 U.S.C. § 1902(a) (1988).

39. 16 U.S.C. § 1372(b)(4) (1985).

40. 18 U.S.C. § 42(c) (1977), 63 Stat. 89 (1949).

41. Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, arts. III(2)(c), IV(2)(c), V(2)(b), 27 U.S.T. 1087, 1093, 1095, 1097, 993 U.N.T.S. 243, 246-48.

tions in Europe have sought Community-wide rules prescribing better conditions for transporting live animals across borders.[42]

Trade measures are also used to pursue humanitarian goals. In 1974, the U.S. Congress conditioned eligibility of nonmarket countries for most-favored-nation status on whether the country denied its citizens the right to emigrate or imposed more than a nominal tax on emigration.[43] In 1978, the Congress prohibited the importation of any product of Ugandan origin until the President certified "that the Government of Uganda is no longer committing a consistant (sic) pattern of gross violations of human rights."[44] In 1987, the Congress forbade the importation of "sugars, sirups [and] molasses" from Panama until the President certified that "freedom of the press and other constitutional guarantees, including due process of law, have been restored to the Panamanian people."[45] In 1996, the Congress imposed a statutory embargo on trade between Cuba and the United States to be terminated only when "a democratically elected government in Cuba is in power."[46]

On several occasions, the U.S. President has taken action without specific direction by the Congress. For example in 1982, President Ronald Reagan withdrew most-favored-nation status from Poland because of the crackdown against the Solidarity labor union.[47] In 1985, President Reagan noted "that the policy and

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42. *See* James Harding, *Protesters refuse to give up and go home*, FIN. TIMES, Apr. 13, 1995, at 9, *available in* LEXIS, News Library, Arcnws File; *The morality of animal rights*, FIN. TIMES, Jan. 30, 1995, at 17, *available in* LEXIS, News Library, Arcnws File.

43. Trade Act of 1974, Pub. L. No. 93–618, § 402(a), 88 Stat. 1978, 2056 (1975).

44. An Act to amend the Bretton Woods Agreement Act, Pub. L. No. 95-435, § 5(c), 92 Stat. 1051, 1052 (1978).

45. An Act making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, Pub. L. No. 100-202, § 562, 101 Stat. 1329-175 (1987) (codified at 7 U.S.C. § 3602 note (1994)).

46. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, §§ 102(h), 204(c), 110 Stat. 785, 794, 810 (1996). The act makes a finding that "[t]he United States has shown a deep commitment, and considers it a moral obligation, to promote and protect human rights . . . ." *Id.* § 2(9).

47. Suspension of the Application of Column 1 Rates of Duty of the Tariff Schedules of the United States to the Products of Poland, Proclamation 4991, Oct. 27, 1982, 96 Stat. 2782. The proclamation lists two concerns: (1) the Polish government "has failed to meet its import commitments" and (2) the Polish government "has taken steps further to increase its repression of the Polish people by outlawing the independent trade union Solidarity, leaving the United States without any reason to continue withholding action on its trade complaints against Poland." *Id.* The vagueness of the so-called trade complaints demonstrates that it was merely a fig leaf for an action to respond to an extraordinary human rights situation. The U.S. government has trade complaints about nearly every country, but rarely withdraws most-favored-nation (MFN) status. *See* U.S. TRADE REPRESENTATIVE, FOREIGN TRADE BARRIERS (1997) (listing current trade complaints).

practice of apartheid are repugnant to the moral and political values of democratic and free societies."[48] As a result, he directed the Secretary of State and the U.S. Trade Representative to consult with parties to the GATT with a view toward adopting a prohibition on the import of Krugerrands.[49] One month later, he banned the importation of Krugerrands.[50]

Outwardly-directed measures can also be applied at the subnational level. For example, Massachusetts is preventing foreign corporations with interests in Myanmar from qualifying for state government procurement contracts.[51] This has led to a high-profile dispute with the European Union (EU).[52]

Restricting imports is not the only way to exert moral or humanitarian influence on other countries. Exports can also be controlled. For example, in 1985, President Reagan banned the export of computer technology to certain entities of the South African government.[53] Currently, the U.S. Department of Commerce allows the export of thumb cuffs to NATO countries, but bars it to other countries.[54]

A. *Rules of Treaty Interpretation*

The proper place to begin interpreting a treaty are the rules laid down in conventional international law. The Vienna Convention on the Law of Treaties provides procedures for interpretation of treaties.[55] Article 31 of the Vienna Convention (General Rule of Interpretation) states that "[a] treaty shall be interpreted in good

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Additionally, it is worth noting that if Poland had lodged a lawsuit in the GATT, which it did not, there would have been no obvious legal defense other than article XX(a).

48. Prohibiting Trade and Certain Other Transactions Involving South Africa, Exec. Order No. 12532, 50 Fed. Reg. 36,861 (1985).

49. *Id.* § 5(a), at 36,863.

50. Prohibition of the Importation of the South African Krugerrand, Exec. Order No. 12535, 50 Fed. Reg. 40,325 (1985).

51. MASS. GEN. LAWS ANN. ch. 7, § 22J (West 1997).

52. Jeremy Gaunt, *US Moral Dictates Thwart Free Trade, Says EU Report*, J. COM., July 31, 1997, at 4A, *available in* LEXIS, News Library, Curnws File.

53. Exec. Order No. 12532, *supra* note 48, § 1(b). The U.N. Security Council had called for voluntary sanctions against South Africa. GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 223 (2nd ed. 1990).

54. Michael S. Lelyveld, *Crime Control or Torture?*, J. COM., Aug. 2, 1996, at 1A, *available in* LEXIS, News Library, Curnws File. *See also* Bruce Clark, *Export Ban Urged on Torture Devices*, FIN. TIMES, June 19, 1996, at 3, *available in* LEXIS, News Library, Curnws File (reporting that Amnesty International has called for an end to international transfers of devices whose sole purpose is the violation of human rights).

55. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[56] Since article XX(a) was drafted by the U.S. government in 1946,[57] it would seem appropriate to examine an English-language dictionary of the period to ascertain the "ordinary meaning" of the term "morals."[58] *The Universal Dictionary of the English Language* defines "moral" as "[r]elating to, concerned with, the difference between right and wrong in matters of conduct."[59] *Webster's New International Dictionary* defines "moral" as "conforming to a standard of what is good and right°. . . ."[60] These dictionary definitions do not help much in answering the two key questions about the meaning of "public morals" in article XX(a)—namely, what morals are covered and whose morals are covered.[61]

The other exceptions in article XX might shed some light on the interpretation of "public morals." Some exceptions are as opaque as to their geographic reach as is article XX(a). For example, it is not clear whether article XX(b)—to protect human, animal or plant life or health—is solely inwardly-directed. Other exceptions clearly seem to look outward. For example, article XX(e)—relating to the products of prison labor—would seem to be outwardly directed in that it would allow governments to condition the entry of imports on the production method used in another country.[62] Article XX(f) covers measures "imposed for the protection of national treasures of artistic, historic or archaeological value." The term "national" is ambiguous. Does it mean that governments may only prevent the export of their own treasures? If so, then the non-use of the term "national" in article XX(a)

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56. *Id.* art. 31(1).

57. *See infra* text accompanying notes 85-93.

58. Another source could be treatises on morality. One of the best is by Adam Smith who also has credentials as a trade theorist. Smith explained that the general rules of morality are founded upon experience of what, in particular instances, our moral faculties and sense of propriety approve or disapprove. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 264 (Liberty Classics ed. 1969) (1759).

59. THE UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 745 (Henry Cecil Wyld ed., 1932).

60. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1592 (William Allan Neilson et al. eds., 2nd ed. 1946).

61. The significance of the term "public" in "public morals" is unclear. *See* Trist v. Child, 88 U.S. (1 Wall.) 441, 451–52 (1874) (using the terms "public morals" and "private morals" without making any distinction between the two).

62. *See* Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 38 (1996).

might be significant. Or would article XX(f) allow governments to ban the imports of another country's treasures in order to help that country retain its cultural heritage? If so, then article XX(f) can be outwardly-directed.

The Vienna Convention explains that an understanding of treaty terms can be informed by the "object and purpose" of the treaty. The object and purpose of the GATT would seem to be to facilitate "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[63] The object and purpose of article XX is to provide "General Exceptions" from the GATT's disciplines. Obviously, there is a tension between the overall purpose of reducing trade barriers and the exceptions carved out for the ten public policy purposes listed in article XX.[64] As John Jackson explained, article XX "recognizes the importance of a sovereign nation being able to act to promote the purposes on this list, even when such action otherwise conflicts with various obligations relating to international trade."[65] Thus, considering the "object and purpose" of GATT may not illuminate the meaning of article XX(a).

The Vienna Convention points to several additional sources for treaty interpretation, but they do not help much. For example, the convention explains that in addition to treaty text, the context of a treaty also includes agreements or instruments of the parties in connection with the conclusion of the treaty.[66] There are no such agreements or instruments for the original GATT.[67] There were a number of agreements in the Uruguay Round that were tied to the re-enactment of the GATT in 1994, but none seem especially rele-

63. GATT, *supra* note 1, Preamble.

64. *Id.* art. XX. The ten purposes involve laws relating to: (a) public morals; (b) human, animal or plant life or health; (c) importation or exportation of gold and silver; (d) securing compliance with domestic laws not inconsistent with the GATT; (e) prison labor; (f) national artistic or historic treasures; (g) exhaustible natural resources; (h) commodity agreements; (i) export restrictions in connection with price controls; and (j) products in short supply. *Id.*

65. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 206 (1989). *See also* WILLIAM ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 415 (1950) (characterizing the public morals exception as one of the "reserved rights" of governments).

66. Vienna Convention, *supra* note 55, art. 31(2)(a).

67. *See generally* KENNETH W. DAM, THE GATT: LAW AND THE INTERNATIONAL ECONOMIC ORGANIZATION 10-16 (1970).

vant to the interpretation of article XX(a).[68] The Vienna Convention also declares that in addition to the context of the treaty, interpretation shall take into account "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty."[69] There are no such agreements regarding article XX(a). Finally, the convention explains that interpretation shall take into account "subsequent practice in the application of the treaty."[70] There is no practice regarding article XX(a),[71] but there is practice regarding the article XX headnote which will be discussed below.[72]

The Vienna Convention provides more applicable guidance in stating that interpretation shall take into account "[a]ny relevant rules of international law."[73] The WTO Appellate Body has endorsed the proposition that the GATT "is not to be read in clinical isolation from public international law."[74] The rules of international law are perhaps better examined in connection with specific moral issues—e.g., trade in goods produced by indentured children.

Article 32 of the Vienna Convention provides guidance for "[s]upplementary means of interpretation." It states that recourse may be had to supplementary means in order to "confirm" the meaning resulting from the application of article 31, or to "determine" the meaning when the interpretation according to article 31 would leave the meaning "ambiguous or obscure" or would lead to a result which is "manifestly absurd or unreasonable."[75] Article 31 seems to leave the meaning of "public morals" ambiguous. Thus, using supplementary means of interpretation is justified. The supplementary means identified in article 32 are "the preparatory work of the treaty and the circumstances of its conclusion."[76] Examining the preparatory work is consistent with the approach taken by many GATT panels which had the task of interpreting GATT provisions.[77]

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68. *See generally* THE LAW OF THE WTO (Philip Raworth & Linda C. Reif eds., 1995).

69. Vienna Convention, *supra* note 55, art. 31(3)(a).

70. *Id.* art. 31(3)(b).

71. 1 GUIDE TO GATT LAW, *supra* note 1, at 565.

72. *See infra* text accompanying note 251. The headnote is also referred to as the introductory clause, the preamble, and the chapeau.

73. Vienna Convention, *supra* note 55, art. 31(3)(c).

74. World Trade Organization Appellate Body, Report of the Appellate Body in *United States—Standards for Reformulated and Conventional Gasoline*, 35 I.L.M. 603, 621 (1996) [hereinafter Appellate Body Gasoline Decision].

75. Vienna Convention, *supra* note 55, art. 32.

76. *Id.*

77. *See* Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 427–30 (1996).

The Dispute Settlement Understanding (DSU) of the WTO also provides guidance on how the GATT should be interpreted. Article 3.2 of the DSU states that the dispute settlement system may "clarify the existing provisions of those [WTO] agreements in accordance with customary rules of interpretation of public international law."[78] In its first decision, the WTO Appellate Body cited article 3.2 when it used the Vienna Convention rules of treaty interpretation.[79] This accords with the views of commentators who state that the DSU provision quoted above refers to articles 31 and 32 of the Vienna Convention.[80]

In its recent *Hormone* decision, the WTO Appellate Body has further clarified what interpretive techniques should be followed by WTO panels.[81] According to the Appellate Body, if the meaning of a treaty is ambiguous, the meaning to be preferred is the one "which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[82] This would seem to imply a stronger role for article XX.

B. *Preparatory Work for Article XX*

The GATT was drafted by governments attending the U.N. Conference on Trade and Employment (of 1946–48).[83] The conference negotiated a Charter for the International Trade Organization (ITO). The GATT was viewed as an interim agreement pending the implementation of the ITO Charter. Therefore, the preparatory work for the ITO Charter is considered to be the preparatory work of the GATT.[84]

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78. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 7, art. 3.2.

79. Appellate Body Gasoline Decision, *supra* note 74, at 621.

80. *See, e.g.*, P. J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 25 NETH. Y.B. INT'L L. 227, 232 (1994).

81. World Trade Organization, *EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body*, Jan. 16, 1998 [hereinafter Appellate Body Hormone Decision].

82. *Id.* ¶ 165 n.154 (quoting 1 OPPENHEIM'S INTERNATIONAL LAW 1273 (R. Jennings & A. Watts eds., 9th ed. 1992)).

83. *See* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 11–30 (2nd ed. 1990).

84. 1 GUIDE TO GATT LAW, *supra* note 1, at 9–11. *See also* Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, Oct. 4, 1996, at 17 n. 39, WTO No. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (using ITO drafting for GATT interpretation) [hereinafter Appellate Body Alcohol Decision].

There is very little legislative history for article XX(a). The U.S. government wrote the first outline of the ITO Charter in December 1945.[85] That outline included a list of exceptions; the first exception was for measures "necessary to protect public morals."[86] In September 1946, the U.S. government issued a "Suggested Charter" which contained an identical exception.[87] At the preparatory meeting in London in November 1946, the minutes show that "[i]t was generally recognized that there must be General Exceptions such as those usually included in commercial treaties, to protect public health, morals, etc."[88] In early 1947, a drafting committee meeting in New York considered the General Exceptions and agreed to the language on public morals contained in the Suggested Charter.[89] During the meeting, the Norwegian delegate pointed out his country's restriction on the importation, production and sale of alcoholic beverages that "had as its chief object the promotion of temperance."[90] The delegate emphasized his understanding that his country's policies on liquor taxes and pricing were covered by the exceptions for public morals and human health.[91] In the Geneva session later that year, the negotiators accepted the New York language on "public morals."[92] This language was put into the GATT and into the final ITO Charter (or Havana Charter).[93] In summary, the drafting history shows that the language for article XX(a), proposed by the U.S. government in 1945, was the same language incorporated into the GATT and into the ITO Charter. Unfortunately, other than noting that arti-

85. Letter of Assistant Secretary Clayton: Proposals for Consideration by an International Conference on Trade and Employment, 13 DEP'T ST. BULL. 914 (1945).

86. *Id.* at 923.

87. U.S. DEP'T OF STATE, SUGGESTED CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION OF THE UNITED NATIONS 24 (1946).

88. *Preparatory Committee of the International Conference on Trade and Employment, Committee II, Draft Report on the Technical Sub-Committee,* U.N. ESCOR, at 32, U.N. Doc. E/PC/T/C.II/54 (1946).

89. *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment,* U.N. ESCOR, U.N. Doc. E/PC/T/34 (Mar. 5, 1947).

90. *Id.* at 31.

91. *Id.*

92. *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report,* U.N. ESCOR, at 18-21, U.N. Doc. E/PC/T/A/PV/25, at 18–21 (1947). The minutes identify as Norwegian the delegate who raised the concern in New York about liquor. *See also Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment,* U.N. ESCOR Preparatory Comm., 2d Sess., at 37, U.N. Doc. E/PC/T/186 Corr. 1 (Aug. 1947).

93. Havana Charter for an International Trade Organization, art. 45(a)(i), 1948 Can. T.S. No. 32 (not in force).

cle XX(a) might be applicable to alcohol, the negotiating history from 1945–48 does not provide a clear answer to what morality and whose morality is covered.

The lack of debate on article XX(a) is nevertheless illuminating. The simplest explanation for why article XX(a) was not discussed is that the negotiators knew what it meant.[94] As noted above, the discussion at the London meeting confirmed that many of the exceptions were viewed as similar to those typically included in commercial treaties. Therefore, since GATT negotiators based their drafting on provisions in prior treaties, it would seem reasonable to consider such treaties as "preparatory work" usable as a supplementary means of GATT interpretation.

C. *Prior Treaties with a Moral Exception*

The first consideration of a moral exception to international trade rules occurred in 1922 at the Genoa Conference. That conference considered a draft agreement calling for a reduction in import and export prohibitions.[95] The agreement stated that certain exceptions must be anticipated, such as measures for "the safeguarding of public health, morals or security."[96] The conference did not adopt the agreement however.

One year later, another international conference was more successful in attaining agreement for the first international trade treaty. This was the International Convention Relating to the Simplification of Customs Formalities.[97] The protocol of the convention declared that the obligations of the convention "do not in any way affect those which they [i.e., parties] have contracted or may in future contract under international treaties or agreements relating to the preservation of the health of human beings, animals or plants (particularly the International Opium Convention), the protection of public morals or international security."[98] Thus, the first general multilateral trade agreement contained an exemption for public morals (pursued by treaty).

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94. A more precise way of putting this would be that negotiators knew that it was an amorphous term covering a wide range of activities that provoked moral concerns by particular governments.

95. *See generally* J. SAXON MILLS, THE GENOA CONFERENCE (1922).

96. *Id.* at 419.

97. International Convention Relating to the Simplification of Customs Formalities, Nov. 3, 1923, 30 L.N.T.S. 373.

98. *Id.* at 409, Protocol ¶ 1.

In 1927, another multilateral negotiation led to the International Convention for the Abolition of Import and Export Prohibitions and Restrictions.[99] In preparation for the negotiation, the Economic Committee of the League of Nations floated a draft convention.[100] This draft included ten exceptions including one for "[p]rohibitions or restrictions imposed for moral or humanitarian reasons or for the suppression of improper traffic, provided that the manufacture of and trade in the goods to which the prohibitions relate are also prohibited or restricted in the interior of the country."[101] The Committee explained that these exceptions "have been admitted through long-established international practice, as recorded in a large number of commercial treaties, to be indispensable and compatible with the principle of freedom of trade."[102] Not just compatible, but indispensable.

Upon reviewing this draft in Washington D.C., the U.S. Department of State communicated its views regarding these exceptions to U.S. negotiators.[103] The State Department declared that retaining the moral exception was "necessary."[104] It explained that: "American prohibitions or restrictions imposed for moral or humanitarian reasons or to suppress improper traffic relate *inter alia* to intoxicating liquors, smoking opium and narcotic drugs, lottery tickets, obscene and immoral articles, counterfeits, pictorial representations of prize fights and the plumage of certain birds."[105] The last item, plumage, is particularly noteworthy because the import ban on plumage was designed to safeguard birds in other countries.[106]

For reasons that remain unknown, the exception for moral and humanitarian measures was deleted in the early negotiations and

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99. International Convention For the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927, 46 Stat. 2461, 97 L.N.T.S. 393. The Convention did not go into force.

100. *Abolition of Import and Export Prohibitions and Restriction, Commentary and Preliminary Draft International Agreement drawn up by the Economic Committee of the League of Nations to serve as a Basis for an International Diplomatic Conference*, League of Nations Doc. C.E.1.22. 1927 II.13 (1927).

101. *Id.* at 15–16.

102. *Id.* at 21.

103. DEP'T OF STATE, *The Secretary of State to the Minister in Switerland (Wilson)*, *in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1927, at 254 (1942).

104. *Id.* at 257.

105. *Id.*

106. *See* ROBIN W. DOUGHTY, FEATHER FASHIONS AND BIRD PRESERVATION *passim* (1975).

then added back later in a more concise form. The minutes of the debate show the Canadian government raising a concern that under the most recent treaty draft, "[d]omestic questions, such as the admission of opium ... were to be subjected to external jurisdiction."[107] When this draft was formally considered, the Egyptian delegation proposed an amendment to insert an exception "for moral and humanitarian reasons."[108] The British delegation also offered an identical amendment.[109] The delegate from Ireland supported the amendment, noting that Ireland prohibited the import of obscene photographs.[110] Then the Egyptian amendment was adopted.[111] Soon afterward in the debate, the Egyptian delegate pointed out that his government prohibited the importation of foreign lottery tickets and asked whether this issue would be covered by the moral exception. The president of the conference answered that it would be covered by the new exception for measures adopted for "moral or humanitarian reasons."[112] In summary, there is clear evidence that opium, obscene photos, and lottery tickets were perceived as coming within the scope of the moral exception. There is also some evidence that the plumage of birds was within the scope.

When the U.S. Senate debated and gave consent to the 1927 treaty, there was an interesting discussion about the moral exception. Senator John J. Blaine inquired whether the treaty permitted governments to bar the importation of goods made under forced or compulsory labor.[113] Senator Arthur Vandenberg answered that he thought the exception for "moral or humanitarian grounds" would address Senator Blaine's concern.[114] Senator Blaine replied that he was worried that imports from Great Britain made under compulsory labor might not be covered because the British correctional system could be viewed as more "humane" (than the U.S. penal system) in that it sometimes consigned accused criminals to reformatories rather than prison.[115] Reformato-

107. *International Conference for the Abolition of Import and Export Prohibitions and Restrictions, Proceedings of the Conference*, at 95, League of Nations Doc. C.21.M.12. 1928 II.7 (1928).

108. *Id.* at 107.

109. *Id.*

110. *Id.* at 108.

111. *Id.*

112. *Id.* at 110.

113. 71 CONG. REC. 3744 (1929).

114. *Id.*

115. *Id.* at 3744–45. The British system could be considered more humane because the prisoner would not have a conviction on his record. *Id.*

ries required participants to work. Senator William E. Borah, chairman of the Foreign Relations Committee, answered that a ban on imports made under compulsion could be justified by the treaty's exception for "public security" or the exception for "moral or humanitarian grounds."[116] Senator Blaine replied that he would want to ban such imports on "economic" grounds.[117] He doubted that an import ban on goods made by forced labor could be supported on humanitarian or moral grounds. Subsequently, the Senate included an understanding in its resolution of ratification, stating that the treaty would permit parties to ban imports made by "forced or slave labor however employed."[118] This debate is noteworthy because it shows that members of the U.S. Senate were aware of the moral exception. While there was a disagreement as to the scope of the moral exception, at least two Senators believed that it could cover moral (or rather immoral) conditions outside of the United States.

It remains unclear whether a moral exception in commercial treaties was a long-established international practice before 1927.[119] There is at least one treaty with such an exception. The treaty of 1881 between Madagascar and the United States declares that commerce between the people of the two countries "shall be perfectly free,"[120] although it permits the Malagasy government to ban imports "tending to the injury of the health or morals of Her Majesty's subjects . . . ."[121] The term "public morals" was used as early as 1919 in the Protection of Minorities Treaty.[122]

After 1927, the moral and humanitarian exception became an established (but not universal) practice in commercial treaties. The phraseology in most treaties with this exception is:

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116. *Id.* at 3745.

117. *Id.*

118. *Id.* at 3785.

119. *See infra* text accompanying note 102.

120. Treaty of Peace, Friendship, and Commerce, May 13, 1881, U.S.-Madag., art. IV(1), 22 Stat. 952, 955.

121. *Id.* art. IV(9), at 956. The treaty does not accord the same exception to the U.S. government. Note that this was not a free-trade agreement.

122. Treaty between the Allied and Associated Powers and Poland (Protection of Minorities), June 28, 1919, art. 2, *reprinted in* 1 INTERNATIONAL LEGISLATION, A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST 283, 287 (Manley O. Hudson ed., 1931) (stating that "[a]ll inhabitants of Poland shall be entitled to the free exercise . . . of any creed, religion or belief, whose practices are not inconsistent with public order or public morals"). *Cf. Universal Declaration of Human Rights*, G.A. Res. 217(III)(A), U.N. GAOR, 3d Sess., pt. 1, art. 29(2), U.N. Doc. A/810 (1948).

"Prohibitions or restrictions imposed on moral or humanitarian grounds."[123] Other treaties provided that exceptions may be made "on moral or humanitarian grounds."[124] One treaty provided an

123. Commercial Convention, July 2, 1928, Czech.-Fr., art. V, 99 L.N.T.S. 107, 111. The official French version of this phraseology is: "Prohibitions ou restrictions édictées pour des raisons morales ou humanitaires." *Id.* at 110. *See also* Agreement Respecting Reciprocal Trade, Sept. 12, 1946, U.S.-Para., art. XVI, 61 Stat. 2688, 2703; Trade Agreement, Feb. 8, 1946, Can.-Mex., art. VI(1), 230 U.N.T.S. 184, 190; Agreement Respecting Reciprocal Trade, Aug. 27, 1943, U.S.-Ice., art. XV, 57 Stat. 1075, 1088; Agreement Respecting Reciprocal Trade, Apr. 8, 1943, U.S.-Iran, art. XII, 58 Stat. 1322, 1327; Agreement Respecting Reciprocal Trade, July 21, 1942, U.S.-Uru., art. XV, 56 Stat. 1624, 1637; Agreement Respecting Reciprocal Trade, May 7, 1942, U.S.-Peru, art. XIV, 56 Stat. 1509, 1521; Commercial Agreement, Aug. 8, 1940, U.S.-U.S.S.R., 54 Stat. 2366, 2372-74; Agreement respecting Reciprocal Trade, Nov. 6, 1939, U.S.-Venez., art. XVI, 54 Stat. 2375, 2381; Trade Agreement, Apr. 1, 1939, U.S.-Turk., art. 12, 202 L.N.T.S. 130, 136; Trade Agreement, Nov. 17, 1938, U.S.-Can., art. XII(2), 199 L.N.T.S. 92, 98; Trade Agreement, Nov. 17, 1938, U.S.-U.K., art. 16, 200 L.N.T.S. 294, 302; Agreement Respecting Reciprocal Trade, Aug. 6, 1938, U.S.-Ecuador, art. XVI, 53 Stat. 1951, 1965; Trade Agreement, Mar. 7, 1938, U.S.-Czech., art. XV, 200 L.N.T.S. 88, 96; Trade Agreement, Sept. 28, 1937, Can.-Guat., art. VII, 194 L.N.T.S. 66, 69; Commercial Agreement, Feb. 19, 1937; U.S.-El Sal., art. VI(2), 179 L.N.T.S. 220, 222; Trade Agreement, Nov. 28, 1936, U.S.-Costa Rica, art. VI(2), 181 L.N.T.S. 184, 186; Provisional Commercial Agreement, Oct. 3, 1936, Austl.-Belgo-Luxemburg Economic Union, art. VII, 177 L.N.T.S. 272, 278; Treaty of Commerce, Aug. 3, 1936, Austl.-Czech., art. 6, 177 L.N.T.S. 246, 248; Agreement Respecting Reciprocal Trade, May 18, 1936, U.S.-Fin., art. XVI, 50 Stat. 1436, 1445-46; Trade Agreement, May 6, 1936, U.S.-Fr., art. XII, 199 L.N.T.S. 260, 269; Reciprocal Trade Agreement, Apr. 24, 1936, U.S.-Guat., art. VI(2), 170 L.N.T.S. 346, 348; Commercial Agreement, U.S.-Nicar., Mar. 11, 1936, art. VI(2), 173 L.N.T.S. 142, 144; Commercial Agreement, Jan. 9, 1936, U.S.-Switz., art. XIV, 171 L.N.T.S. 232, 238-40; Treaty of Commerce, Dec. 20, 1935, U.S.-Neth., art. XI, 178 L.N.T.S. 241, 253; Commercial Agreement, Dec. 18, 1935, U.S.-Hond., art. V, 167 L.N.T.S. 314, 316; Trade Agreement, Nov. 15, 1935, U.S.-Can., art. XII, 168 L.N.T.S. 356, 362; Agreement Respecting Reciprocal Trade, Mar. 28, 1935, U.S.-Haiti, art. VI, 49 Stat. 3737, 3741; Treaty of Commerce and Navigation, Aug. 29, 1933, Bulg.-Czech., art. XIX, 148 L.N.T.S. 17, 29; Commercial Treaty Between the Economic Union of Belgium and Luxemburg and Switzerland, Aug. 26, 1929, art. 4, 105 L.N.T.S. 11, 13-15; Commercial Convention, July 8, 1929, Fr.-Switz., art. 5, 114 L.N.T.S. 191, 193; Convention Regarding Establishment, Commerce and Navigation, June 11, 1929, Rom.-Turk., art. 10, 112 L.N.T.S. 141, 147; Convention of Commerce, Customs and Navigation, Apr. 30, 1929, Czech.-Persia, art. 6, 110 L.N.T.S. 359, 361; Convention of Commerce, Customs and Navigation, Feb. 17, 1929, Germ.-Persia, art. VI, 111 L.N.T.S. 283, 284. The moral or humanitarian exception also appeared in one unperfected multilateral agreement. *See* Convention for the Lowering of Economic Barriers, July 18, 1932, art. 3(2), *reprinted in* 6 INTERNATIONAL LEGISLATION, A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST, *supra* note 122, at 94, 96 (not in force).

124. Agreement Regarding the Commercial Relationship Between Swaziland, Basutoland and the Bechuanaland Protectorate and the Colony of Mozambique, May 11, 1938, Port.-U.K, art. 6, 191 L.N.T.S. 286, 290; Convention of Commerce and Navigation, Aug. 11, 1931, Greece-Rom., art. 5, 130 L.N.T.S. 35, 37; Provisional Commercial Agreement, Aug. 28, 1930, Neth.-Rom., art. 3, 108 L.N.T.S. 179, 181; Treaty of Commerce and Navigation, May 28, 1930, Neth.-Yugo., art. 5, 129 L.N.T.S. 75, 77; Commercial Agreement Regulating the Commercial Relations Between Swaziland, Basutoland, and the Bechuanaland Protectorate and the Portuguese Colony at Cape Town, Feb. 13, 1930, Mozam.-S.

exception for the "maintenance of public morality."[125] One treaty provided an exception for the "protection of health and public morals."[126] Another treaty lacked a moral exception, but included an exception "for the putting into force of police or fiscal laws, including laws prohibiting or restricting the import, export or sale of alcohol or alcoholic beverages, of opium, coca leaf and their derivatives and other narcotic substances."[127]

To summarize, following 1927 many commercial treaties contained a moral exception. Most of these exceptions linked moral and humanitarian goals. Other treaties listed morality without mentioning humanitarianism.

D. *The Perceived Need for the Moral Exception*

The moral exception was a response to the fact that many governments were banning imports or exports for moral or humanitarian reasons.[128] These governments wanted to be sure that their new obligations in trade treaties would not interfere with border controls employed for non-commercial reasons. Morally-motivated trade controls were carried out pursuant to both treaties and national laws. Examining these treaties and laws can facilitate the process of inferring the intention of policymakers who insisted upon a moral exception in trade agreements.

Anti-slavery treaties were the first global regime to prohibit trade for moral reasons.[129] In the Treaty of Vienna, the parties declared that the slave trade "has been considered by just and en-

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Afr., art. 8, 108 L.N.T.S. 394, 395; Convention Regulating the Introduction of Native Labour from Mozambique into the Province of the Transvaal, Railway Matters, and the Commercial Intercourse Between the Union of South Africa and the Colony of Mozambique, Sept. 11, 1928, Port.-S.Afr., art. LII, 98 L.N.T.S. 10, 30. In one treaty, the authentic French version of the exception refers to measures "imposées pour des motifs d'ordre moral ou humanitaire." Trade Agreement, Apr. 23, 1937, Can.-Haiti, art. VII, 194 L.N.T.S. 60, 63.

125. Treaty of Amity and Commerce, Feb. 12, 1930, China-Czech., art. XIII, 110 L.N.T.S. 286, 290.

126. Provisional Agreement relating to Commerce and Navigation, Feb. 17, 1924, Lith.-Swed., 23 L.N.T.S. 155, 155.

127. Treaty of Friendship and Commerce, Nov. 4, 1937, Siam-Switz., art. III, 190 L.N.T.S. 139, 143.

128. As Professor Corrado Gini explained, "a policy may be designed, not to protect the material interests of the citizens, but to safeguard their health and public morals, and it may be injurious not only to foreign but also to home industries." PROFESSOR GINI, REPORT ON THE PROBLEM OF RAW MATERIALS AND FOODSTUFFS 28 (League of Nations, 1921).

129. *See* Ethan A. Nadelmann, *Global prohibition regimes: the evolution of norms in international society*, 44 INT'L ORG. 479, 491, 497 (1990).

lightened men of all ages as repugnant to the principles of humanity and universal morality."[130] In 1817, Great Britain and Portugal signed the Prevention of the Slave Trade Convention which forbade the importation of slaves "into the Brazils, under any flag, other than that of Portugal"[131] and then only with ships holding a royal passport.[132] In the General Act of 1890, the parties that recognized slavery agreed to prohibit the importation of slaves.[133] Because of the "pernicious" role of firearms in the slave trade "as well as internal wars between the native tribes," the Act also prohibited the importation of firearms (with some exceptions) into sub-Saharan Africa.[134]

Another treaty system that used trade controls for moral reasons was the narcotics regime. In the International Opium Convention of 1912, the parties agreed to prohibit the importation of prepared opium at once and its exportation "as soon as possible."[135] In an earlier bilateral treaty, the Chinese and U.S. governments had agreed to prohibit Chinese subjects from importing opium into the United States and American citizens from importing opium into China.[136]

Although less developed than narcotics, there was also an international regime regulating trade in liquor. Because of a concern about the "moral and material consequences to which the abuse of spirituous liquors subjects the native population," the General Act of 1890 prohibited the importation of liquor into the parts of sub-Saharan Africa where the use of liquor did not exist or had not been developed.[137] There were similar provisions in the African

130. Declaration of the Eight Courts relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815 (Annex XV of the Treaty of Vienna), 63 Consol. T. S. 473, 474 (author's translation).

131. Additional Convention between Great Britain and Portugal for the Prevention of the Slave Trade, July 28, 1817, art. III, 67 Consol. T. S. 373, 398.

132. *Id.* art. IV, at 398-99.

133. General Act for the Repression of the African Slave Trade, July 2, 1890, art. LXII, 27 Stat. 886, 912.

134. *Id.* arts. VIII, IX, at 894-95.

135. International Opium Convention, Jan. 23, 1912, art. 7, 38 Stat. 1912, 1931. In 1914, the U.S. government responded by banning the importation and exportation of opium subject to some exceptions. An Act To amend an Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," §§ 1–6, 38 Stat. 275-77, 21 U.S.C. § 173 (repealed).

136. Treaty concerning Commercial Intercourse and Judicial Procedure, Nov. 17, 1880, China-U.S., art. II, 22 Stat. 828, 828, 157 Consol. T.S. 182, 182-83.

137. General Act for the Repression of the African Slave Trade, *supra* note 133, arts. XC, XCI. There was an exception to provide liquor for the non-native population. *Id.* art. XCI.

Liquor Convention of 1919.[138] In 1925, a multilateral Convention for the Suppression of Contraband Traffic in Liquor was signed.[139] Noting that this traffic "constitutes a danger for public morals," the parties agreed to prohibit vessels weighing less than 100 tons to export alcoholic liquors.[140]

Another regime regulated traffic in obscene publications. In 1924, the parties to the new international convention agreed to make it a punishable offense to import or export any "obscene matters or things."[141] This included writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, and films. Obscenity was not defined.

A few treaties dealt with animal welfare. In 1921, a treaty regulating fishing in the Adriatic forbade the use of explosives "calculated to stun or stupefy the fish" and banned the sale of fish "caught by these methods."[142] In 1935, the International Convention concerning the Transit of Animals provided that "the exporting countries shall take steps to see that the animals [being transported across a border] are properly loaded and suitably fed and that they receive all necessary attention, in order to avoid unnecessary suffering."[143]

Finally, four other treaty provisions reflecting moral sentiments provide useful context. In 1868, the parties to the Declaration of St. Petersburg agreed that "the necessities of war ought to yield to the demands of humanity" and therefore renounced the use of explosive projectiles weighing less than 400 grams.[144] In 1919, the Treaty of Versailles stated that the governments in the League "[w]ill endeavor to secure and maintain fair and humane condi-

138. African Liquor Convention, Sept. 10, 1919, arts. 2–4, 46 Stat. 2199, 2206.

139. Convention for the Suppression of the Contraband Traffic in Alcoholic Liquors, Aug. 19, 1925, 42 L.N.T.S. 73.

140. *Id.* Preamble & art. 2.

141. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, *opened for signature* Sept. 12, 1923, art. 1, 27 L.N.T.S. 215, 223.

142. Agreement Concluded between the Delegates of the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, Regarding a Draft Convention for the Regulation of Fishing in the Adriatic, Sept. 14, 1921, art. 28, 19 L.N.T.S. 39, 51. The treaty does not make clear whether the motivation was animal welfare. Other motivations could include environment, public health, or sportsmanship.

143. International Convention concerning the Transit of Animals, Meat and other Products of Animal Origin, Feb. 20, 1935, art. 5, 193 L.N.T.S. 39, 45.

144. The Declaration of St. Petersburg, Dec. 11, 1868, 138 Consol. T. S. 297, *reprinted in* 1 AM. J. INT'L L. 95 (Supp.) (1907). In correspondence with the author, Christopher D. Stone posed this question: If those who framed the laws of warfare provided for benign treatment of prisoners and the environment, why should anyone doubt that those who framed the laws of trade were capable of comparable motivation?

tions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend."[145] The treaty also suggested that the Mandatory for Central Africa should prohibit abuses "such as the slave trade, the arms traffic, and the liquor traffic."[146] Lastly, the treaty publicly arraigned the former German Emperor for "a supreme offense against international morality and the sanctity of treaties."[147]

In summary, several treaties regulated trade for moral reasons. Only the liquor treaties explicitly mentioned "moral consequences" or "public morals," but it seems clear that the international lawmaking regarding slavery, firearms, opium, pornography, and animal cruelty sprung from beliefs about morality and rectitude. The international concerns about exporting opium, exporting pornography, and smuggling liquor were outwardly-directed. The international concerns about importing slaves, transferring firearms into Africa, importing opium, importing liquor into Africa, importing pornography, and conditions of animals were both outwardly-directed and inwardly-directed.

Governments also regulated trade for moral reasons outside of the context of treaty obligations or inducements.[148] A variety of these measures can be seen in pre-1927 law. Let us start with import controls and then look at export controls.

As a 1923 textbook on international commercial policies pointed out, "[a]ll civilized states prohibit the importation of certain articles offensive to the national morality."[149] For example, in 1761, Portugal forbade the importation of Negro slaves as being "shameful."[150] In 1807, the British government banned the importation of slaves.[151] In 1842, the U.S. government banned the im-

145. Treaty of Versailles, June 28, 1919, art. 23(a), 225 Consol. T.S. 188, 204.

146. *Id.* art. 22.

147. *Id.* art. 227.

148. *See* RICHARD CARLTON SNYDER, THE MOST-FAVORED-NATION CLAUSE 163 (1948) (noting that "[e]very nation protects itself against obscene literature and certain kinds of propaganda").

149. GEORGE MYGATT FISK & PAUL SKEELS PEIRCE, INTERNATIONAL COMMERCIAL POLICIES WITH SPECIAL REFERENCE TO THE UNITED STATES, A TEXT-BOOK 80 (1923).

150. *Slavery–Report of the Advisory Committee of Experts*, League of Nations Doc. C.112.M.98. 1938.VI, Annex 21, at 125 (1938). Note that the slaves were viewed as a commodity. This was not an immigration provision. Note also that slave trade with the Brazils was apparently not as shameful. *See* text accompanying *supra* note 131.

151. An Act for the Abolition of the Slave Trade, Mar. 25, 1807, 47 Geo. 3, ch. 36 (1807) (Eng.). *See also* Le Louis, 2 Dods. 210 (1817), 165 Eng. Rep. 1464 (holding that capture of a French slaving ship violates the law of nations, notwithstanding the fact that

portation of "all indecent and obscene prints, paintings, lithographs, engravings, and transparencies."[152] In 1873, the U.S. Comstock Act prohibited the importation of "any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion."[153] In 1876, the British Customs Consolidation Act prohibited the importation of "indecent or obscene articles."[154] In 1909, the U.S. government banned the importation of opium except for medicinal purposes.[155] In 1912, the U.S. government banned the importation of any film "of any prize fight or encounter of pugilists" which may be used for purposes of public exhibition.[156] In the Underwood Tariff of 1913, the U.S. government banned the importation of lottery tickets.[157] Before the revolution, Russia had a law banning the importation of articles of "an irreligious, irreverent, blasphemous or impious character."[158] In 1921, Canada had a law banning the importation of posters and handbills depicting scenes of criminal violence.[159] In 1923, Persia had a law prohibiting the importation of writings or pictures opposed to the Moslem religion.[160] Sudan had a law banning articles "calculated to throw contempt on the Moslem or Christian religion."[161] By banning the importation of obscene prints, indecent articles, abortion-inducing drugs, opium, fight films, violent pictures, lottery tickets, and anti-Moslem articles, the various governments were trying to protect the morals of their own inhabitants. The banning of slave imports probably had dual motivations—

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slave trading violated the French code, and that such unlawful means could not be consonant with private morality).

152. An Act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes, Aug. 30, 1842, § 28, 5 Stat. 548, 566 (repealed).

153. An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of Immoral Use, Mar. 3, 1873, 17 Stat. 598, 598 (repealed). *See also* Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 70 n.19, 70-71 (1983) (discussing history of Comstock Act and holding mail ban unconstitutional).

154. An Act to consolidate the Customs Laws, July 24, 1876, 39 & 40 Vict., ch. 36, § 42 (Eng.).

155. An Act To prohibit the importation and use of opium for other than medicinal purposes, Feb. 9, 1909, 35 Stat. 614.

156. An Act To prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights, and for other purposes, July 31, 1912, § 1, 37 Stat. 240 (repealed).

157. An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes, Oct. 3, 1913, 38 Stat. 114, 194 (repealed).

158. FISK & PEIRCE, *supra* note 149, at 80.

159. T.E.G. GREGORY, TARIFFS: A STUDY IN METHOD 115 (1921).

160. FISK & PEIRCE, *supra* note 149, at 80.

161. *Id.*

preventing moral turpitude at home and securing the moral welfare of potential victims of slavery overseas.

Exports have been controlled for several moral reasons. For example in 1891, the U.S. Congress authorized the Secretary of Agriculture to examine vessels used in exporting cattle to foreign countries as to the space, ventilation, fittings, food and water supply and other such requirements "as he may decide to be necessary for the safe and proper transportation and humane treatment of such animals."[162] If these requirements were violated, the Secretary was empowered to ban the vessel from exporting cattle.[163] In 1914, the British government prohibited the exportation of horses unless such a horse had been certified by a veterinary surgeon as capable of being worked without suffering.[164] In 1920, the U.S. government imposed a criminal penalty for the exportation of "any obscene, lewd, or lascivious, or any filthy book" or any drug or thing "intended for preventing conception, or producing abortion, or for any indecent or immoral use."[165] The export controls for cattle and horses were aimed at the humane treatment of domestic animals being moved outside one's territory, and thus were both inwardly and outwardly-directed. The controls on pornography and abortion seemingly also had a dual motive. They were aimed at protecting the morals of Americans who wanted to profit by selling these items abroad. Yet they were also seemingly aimed at protecting the morals of foreigners who might buy and use these items. Thus, these export controls were both inwardly and outwardly-directed.

Another export control episode worth noting was the informal "moral embargo" by the U.S. government in 1940.[166] The embargo applied to airplanes and aviation gasoline destined for any country whose government was engaged in the bombing of civilians. The U.S. Department of State's Legal Advisor at the time explained that such moral embargoes were "based for the most part upon

162. An act to provide for the safe transport and humane treatment of export cattle from the United States to foreign countries, and for other purposes, § 1, Mar. 3, 1891, 26 Stat. 833 (repealed but similar law codified at 46 U.S.C. §§ 3901–02 (1994)).

163. *Id.* § 2.

164. EDWARD G. FAIRHOLME & WELLESLEY PAIN, A CENTURY OF WORK FOR ANIMALS 156–57, 253 (1924).

165. An Act To amend the penal laws of the United States, June 5, 1920, 41 Stat. 1060 (repealed). There was also a penalty for the importation of such items.

166. 11 DIG. OF INT'L LAW 423 (Marjorie M. Whiteman ed., 1968).

humanitarian considerations."[167] This export control was outwardly-directed.

E. *A Summary of Interpretation According to the Vienna Convention*

It may be useful at this point to summarize our progress in intuiting the scope of article XX(a). We started with the directive in article 31 of the Vienna Convention to interpret a treaty in accordance with its ordinary meaning and in light of its object and purpose. The words of article XX(a) do not reveal what issues are covered by "public morals" or whether such morals can refer to circumstances outside of the state employing the trade measure. Looking at other exceptions in article XX, we see that at least one of them, article XX(e), is outwardly-directed. Considering the object and purpose of the GATT leads to an ambiguous result since the exception is meant to allow deviation from the rules. We then moved to the supplementary means of interpretation in article 32 of the Vienna Convention for the following reasons: 1) there were no relevant instruments of the parties in connection with the conclusion of article XX; 2) there was no subsequent agreement between the parties regarding Article XX(a); and 3) there was no subsequent explicit practice between the parties regarding Article XX(a).

The *travaux preparatoires* for article XX(a) reveals little about its scope except that it may cover alcohol. An examination of the history of moral exceptions in trade treaties, however, shows that they were a response to a broadly-felt need for trade rules which do not hinder customs measures with moral aims. At international conferences, the need to exempt import bans relating to narcotics, pornography, and lottery tickets was specifically discussed.

The difference in phrasing between the "public morals" exception in GATT article XX(a) and the pre-World War II trade practice of providing an exception for "moral or humanitarian grounds" can be viewed in two ways. On the one hand, one might argue that "public morals" subsumes both "moral" and "humanitarian" grounds. On the other hand, one might argue that "humanitarian" grounds were intentionally left out of "public

167. *Id.* at 424. This suggests that U.S. Department of State officials were using the terms "moral" and "humanitarian" interchangeably.

morals."[168] The issue is an important one since humanitarian aims are more likely to be outwardly-directed than inwardly-directed. The evidence from the archives sheds no light on why the U.S. government, in drafting article XX(a), used the more succinct phraseology.

The rationale for the moral exception in trade treaties can be inferred from the contemporary trade controls that could have triggered the legal need for an exception. There were trade controls on opium, pornography, liquor, slaves, firearms, blasphemous articles, products linked to animal cruelty, prize fight films, and abortion-inducing drugs. They were unilateral and treaty based. Some were inwardly-directed. Some were outwardly-directed. Other controls responded to both concerns.

This variety of moral purposes for trade measures was the backdrop against which article XX(a) was written. While this pre-1946 history is not part of the official preparatory work for the GATT, this review provides a context for understanding the rationale for article XX(a). The purposes listed above fill in an answer to the first question posed at the beginning of this article—that is, what behavior is covered by the open-ended language in article XX(a). The review of prior treaties and laws also begins to answer the second question—that is, whose morality can be protected. Given the longtime use of trade measures for moral and humanitarian purposes, the authors of article XX(a) could have understood it to be outwardly-directed in addition to being inwardly-directed. In view of available evidence, however, this remains an open question.

The various ways morality-based trade measures had been employed before the GATT was written foreshadow many of the uses to which article XX(a) might be enlisted today. Concerns about narcotics, pornography, alcohol abuse, animal cruelty, bombing of civilians, and abortion-inducing drugs remain strong 50 years after the GATT was written. The one new element in today's debate is the use of trade measures to pressure other countries to democratize.

The Vienna Convention does not provide the final word on how to interpret treaties, however. Critics of the convention have suggested that international law countenances a less rigid approach

168. One Commentator suggests that the humanitarian aim was subsumed under article XX(e), but no evidence is presented. V. A. SEYID MUHAMMAD, THE LEGAL FRAMEWORK OF WORLD TRADE 171–73 (1958).

relying more on context and negotiating history.[169] Although the resort to history here is justified under article 32 of the Vienna Convention, in view of the insufficient light from article 31, some analysts might accord greater weight to the long history of the moral exception in trade relations.

When an article XX(a) case comes to the WTO, litigants will seek to persuade panels not only by using arguments based on the Vienna Convention but also by analogizing from other case law. Prior GATT adjudication concerning article XX exceptions, in particular the environmental exceptions in articles XX(b) and (g), may be used to determine whether article XX(a) can encompass outwardly-directed measures.[170] This case law, however has no legal status in the WTO regime because the relevant decisions were not adopted by the GATT Council.[171] Panels might also draw insights from adjudication of a similar moral exception in European institutions. These two sources are discussed below.

F. *GATT Adjudication: The Tuna-Dolphin Cases*

The Tuna-Dolphin cases involved a complaint against provisions of the U.S. Marine Mammal Protection Act (MMPA) that ban importation of tuna from countries under certain conditions. Imports of yellowfin tuna are not permitted from harvesting countries operating in the eastern tropical Pacific unless the exporting country has a regulatory program comparable to that of the United States with regard to side effects on marine mammals.[172] Among the MMPA comparability factors is a requirement that the dolphin kill rate be no more than 125 percent of the rate attained by the U.S. fleet.[173] The Act prohibits imports into the United States from supplying (or intermediary) countries—defined as countries that import tuna from a harvesting country whose tuna is banned from the United States.[174]

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169. *See, e.g.*, MYRES S. MCDOUGAL, ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER lviii-lxv, 122–24 (rev. ed. 1994) (criticizing the subordination of supplementary means of interpretation).

170. *See* Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37 (Oct. 1991).

171. *See* Appellate Body Alcohol Decision, *supra* note 84, at 14–15. Prior to the creation of the WTO, a GATT panel report had to be adopted by consensus in the GATT Council (consisting of all member governments) before it would have any legal effect. 2 GUIDE TO GATT LAW, *supra* note 1, at 761.

172. 16 U.S.C. § 1371(a)(2)(B) (1997).

173. 16 U.S.C. § 1371(a)(2)(B)(ii) (1997).

174. 16 U.S.C. § 1371(a)(2)(C) (1997).

In the first Tuna-Dolphin case (*Tuna-Dolphin I*), the Government of Mexico as plaintiff charged that the MMPA embargoes violate the GATT.[175] In September 1991, the GATT panel ruled in favor of Mexico. The panel's report was not approved by the GATT Council, however.[176]

In the second Tuna-Dolphin case (*Tuna-Dolphin II*), the European Commission and the Netherlands as plaintiffs charged that the embargoes violate the GATT.[177] In June 1994, the panel ruled in favor of the Commission and the Netherlands. The panel's report was not approved by the GATT Council however.

The *Tuna-Dolphin I* panel found that the MMPA embargo violated GATT article XI and was not saved by GATT article XX.[178] In its analysis, the panel introduced the concept of extrajurisdictionality. Although it did not define the term, the panel viewed the MMPA as "extrajurisdictional" because it was aimed at protecting dolphin lives outside of the United States.[179] Thus, the term seems synonymous with outwardly-directed as used here. It is interesting to note the conclusions of an earlier GATT panel hearing a complaint by Canada against a tuna import ban pursuant to the U.S. Fishery Conservation and Management Act of 1976. The panel did not notice or discuss the extrajurisdictionality of the U.S. import ban.[180] The panel found that the U.S. import ban did not qualify for GATT article XX(g) treatment because there were no parallel domestic conservation measures.[181] Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective

175. Tuna-Dolphin I, *supra* note 23, ¶ 3.1.

176. For a discussion of GATT and WTO adjudication, see INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997).

177. United States—Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994) [hereinafter Tuna-Dolphin II]. The Netherlands is a member of the European Community, but in this instance was acting for the Netherlands Antilles.

178. Tuna-Dolphin I, *supra* note 23, ¶ 7.1.

179. *Id.* ¶ 5.28. The use of the term "extrajurisdictional" is somewhat ironic because states surely have jurisdiction to control what is imported into their territory under the territorial principle. *See* Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2194 (1995).

180. United States–Prohibition of Imports of Tuna and Tuna Products from Canada, Feb. 22, 1982, GATT B.I.S.D. (29th Supp.) at 91 (1983). Although the Tuna-Dolphin I panel took no note of this earlier case, the Tuna–Dolphin II panel did. *See* Tuna–Dolphin II, *supra* note 177, ¶ 5.15.

181. United States—Prohibition of Imports of Tuna, *supra* note 171, ¶ 4.12.

in conjunction with restrictions on domestic production or consumption."[182]

The first legal issue considered by the *Tuna-Dolphin I* panel regarding article XX was the selection of the proper interpretive approach. The panel observed that it had been the practice of previous panels "to interpret Article XX narrowly."[183] A narrow interpretation certainly suffuses the *Tuna-Dolphin I* decision. It is interesting to note, however, that until the *Tuna-Dolphin I* panel, there was no established GATT panel practice of interpreting article XX narrowly. In support of the precedent of a narrow interpretation, the *Tuna-Dolphin I* panel cited two previous panel reports—*Foreign Investment Review Act* and *Section 337*.[184] Neither of the cited paragraphs provide a precedent for a narrow interpretation. Moreover, the *Tuna-Dolphin I* panel fails to provide any analysis as to why article XX should be interpreted narrowly. Subsequent to the *Tuna-Dolphin I* report, the United States *Alcoholic Beverages* panel of 1992 stated (in an adopted report) that GATT panels had followed the practice of "interpreting these Article XX exceptions narrowly, placing the burden on the party invoking an exception to justify its use."[185] In 1994, the *Tuna-Dolphin II* panel stated that it had been the "long-standing practice" of panels to interpret article XX narrowly and cited the same two unsupportive cases that the *Tuna-Dolphin I* panel did.[186]

The second legal issue before the *Tuna-Dolphin I* panel was the geographic scope of article XX(b). Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health."[187] The U.S. government pointed to this provision in defense of the MMPA. The Mexican government replied that article XX(b) could not be used to justify a measure "to protect the

182. GATT, *supra* note 1, art. XX(g).

183. Tuna-Dolphin I, *supra* note 23, ¶ 5.22.

184. *Id.* ¶ 5.22 (*citing* United States—Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345, 393 ¶ 5.27 (1990); Canada—Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140, 164-65 ¶ 5.20 (1984)).

185. United States—Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206, 282 ¶ 5.41 (1993).

186. Tuna-Dolphin II, *supra* note 177, ¶¶ 5.26, 5.38. This GATT practice of narrow construction of Article XX has been criticized by Christoph T. Feddersen. *See* Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 95-96 (1998), *available in* LEXIS, Lawrev Library, Allrev File (suggesting that the narrow construction of Article XX be abandoned).

187. GATT, *supra* note 1, art. XX(b).

life or health of animals outside the jurisdiction of the contracting party taking it."[188] The panel admitted that this "basic question" was not clearly answered by the text of article XX(b).[189] Considering the drafting history, the panel concluded that article XX(b) was inwardly-directed.[190] Looking at consequences of possible interpretations on the operation of the GATT, the panel was worried that if the "broad" interpretation of the U.S. government was accepted, then "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights" under the GATT.[191]

The *Tuna-Dolphin I* panel dealt with a third legal issue, the geographic scope of article XX(g). The U.S. and Mexican governments took the same position as with article XX(b). Unlike its article XX(b) analysis, the panel did not begin by looking at the drafting history. Rather, the panel put forward a textual syllogism that since article XX(g) contemplated that import measures be taken in conjunction with domestic controls on production or consumption, and since a government could only apply such controls to resources under its jurisdiction, then the import measures could only be applied to resources within an importing nation's jurisdiction.[192]

The *Tuna-Dolphin II* panel took a somewhat different track. After finding that the primary and secondary embargoes were contrary to GATT article XI, the panel considered the defense of article XX(g) claimed by the U.S. government.[193] The counsel from the Commission and the Netherlands argued that a qualifying resource had to be "within the territorial jurisdiction of the

188. Tuna-Dolphin I, *supra* note 23, ¶ 5.24.

189. *Id.* ¶ 5.25.

190. *Id.* ¶ 5.26. Many commentators have challenged this conclusion. *See, e.g.*, Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 TEMP. L. REV. 751, 769 (1993); Alan S. Rafferman, *Chicken of the Sea: GATT Restrictions on United States Environmental Measures Designed to Protect Marine Mammals*, 3 FORDHAM ENVTL. L. REP. 81, 90 (1991).

191. Tuna-Dolphin I, *supra* note 23, ¶ 5.27. The panel also noted other problems with the MMPA that would make it GATT-illegal even if article XX permitted extra-jurisdiction. *Id.* ¶¶ 5.28, 5.33.

192. *Id.* ¶ 5.31. Many commentators have challenged this circular conclusion. *See, e.g.*, Naomi Roht-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LIT. 57, 82-83 (1992); Daniel P. Blank, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L. J. 61, 75 (1996).

193. Tuna-Dolphin II, *supra* note 177, ¶¶ 5.10, 5.11.

country taking the measure."[194] The panel first noted that the language of article XX(g) does not spell out any limitation on the location of the resources being conserved.[195] The panel then pointed out:

> [D]ifferent treatment to products of different origins could in principle be taken under other paragraphs of Article XX and other Articles of the General Agreement with respect to things located, or actions occurring, outside the territorial jurisdiction of the party taking the measure. An example was the provision in Article XX(e) relating to the products of prison labour.[196]

The panel also considered the drafting history of article XX(g) as a supplementary means of interpretation prescribed by the Vienna Convention. The panel noted that the U.S. government had pointed to the language of the international trade convention of 1927 and various bilateral commercial treaties which permitted import restrictions to prevent animal extinction, but the panel declared that these treaties were "of little assistance" because it appeared to the panel that "no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments."[197] Therefore, without making use of the negotiating history, the panel concluded that article XX(g) need not be limited to "resources located within the territory of the contracting party invoking the provision."[198]

Nevertheless, the panel found the MMPA to be a violation of the GATT. The panel characterized the tuna embargoes as efforts "to force other countries to change their policies with respect to persons and things within their own jurisdiction."[199] The panel asserted that this goal indicated that the measures were not primarily aimed either at the conservation of natural resources or at rendering domestic restrictions effective, as required by article XX(g).[200] But the panel provided no reasons for this conclusion

194. *Id.* ¶ 5.11.
195. *Id.* ¶ 5.15.
196. *Id.* ¶ 5.16.
197. *Id.* ¶¶ 3.29, 5.20.
198. *Id.* ¶ 5.20.
199. *Id.* ¶ 5.24.
200. *Id.* ¶ 5.27.

other than to note the policy argument that such a usage of article XX(g) would impair access to markets.[201]

The panel's analysis of the scope of article XX(b) was similar to its analysis of article XX(g). Although article XX(b) might in principle protect animals outside the jurisdiction of the importing country, trade measures could not be used "to force other countries to change their policies" within their jurisdiction.[202] The panel did not explain why except to say that measures contingent on reaction by target countries might not be "necessary" under article XX(b) and that such trade measures would seriously impair the GATT's objectives.[203]

Since neither of the Tuna-Dolphin decisions were adopted, they would be weak precedents for a future panel considering article XX(a). Nevertheless, these decisions suggest how an article XX(a) defense of an outwardly-directed import ban might fare. One possibility is that a WTO panel might follow *Tuna-Dolphin I* and conclude that article XX(a) only applies to domestic morality. The more likely scenario, however, is that a panel would follow *Tuna–Dolphin II* and find that article XX(a) will not validate an import ban to force higher morality onto the exporting country.[204]

It is interesting to note that the pleadings in both Tuna-Dolphin cases mentioned article XX(a) several times. In *Tuna-Dolphin I*, the representative of Australia postulated that article XX(a):

> could justify measures regarding inhumane treatment of animals, if such measures applied equally to domestic and foreign animal products; a panel could not judge the morals of the party taking the measure, but it could judge the necessity of taking measures inconsistent with the

201. *Id.* ¶¶ 5.26, 5.27. Many commentators have challenged this conclusion. *See, e.g.*, Chang, supra note 179, at 2131, 2145, 2172, 2175-76, 2183, 2190; Steve Charnovitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 ENVTL. L. REP. 10567, 10574–75 (1994).

202. Tuna-Dolphin II, *supra* note 177, ¶ 5.39.

203. *Id.* ¶¶ 5.38, 5.39.

204. It is not clear when an import ban on products made by indentured children is designed to "force" foreign producers not to abuse children, as opposed to preventing consumers from participating in transactions with immoral producers. Researchers have found that a growing number of people don't want to buy a shirt made by children in Bangladesh or forced labor in China. G. Pascal Zachary, *Levi Tries to Make Sure Contract Plants in Asia Treat Workers Well*, WALL ST. J., July 28, 1994, at A1, *available in* 1994 WL-WSJ 337113. The best policy might be to place a label on shirts informing the consumer of the working conditions of the shirt maker. When such verifiable labels do not exist, the next best policy might be an import ban. Of course, an import ban trounces on the rights of the consumer who wants to buy cheaper shirts made by exploited children.

General Agreement, and their consistency with the Preamble of article XX.[205]

In *Tuna-Dolphin II*, the representatives of the Commission and the Netherlands postulated that under article XX(a), "it could only make sense for a country to take border measures designed to protect its *own* public morals, not the public morals outside its national jurisdiction."[206] Thus, the Australian government has affirmed that article XX(a) may be outwardly-directed while the European Commission has denied it.

G. *The Moral Exception in European Treaties*

An exception for the protection of public morals has been incorporated into some European treaties. The European Convention for the Protection of Human Rights enshrines certain individual rights—namely, respect for privacy, freedom of thought, freedom of expression, and freedom of assembly—but provides that governments may restrict these rights for various reasons including "the protection of health or morals."[207] Article 30 of the Treaty of Rome forbids quantitative restrictions and all measures having similar effect.[208] Article 36, however, provides an exception for prohibitions or restrictions "justified on grounds of public morality."[209] The exception notes that such prohibitions or restrictions "shall not, however, constitute either a means of arbitrary discrimination or a disguised restriction on trade between Member States."[210] European courts on a few occasions have interpreted these provisions and dealt with the same issues that would arise in GATT article XX(a) interpretation.

The leading decision by the European Court of Human Rights (ECHR) interpreting the moral exception is *Handyside* v. *United Kingdom* (decided in 1976).[211] Handyside, a book publisher con-

205. Tuna-Dolphin I, *supra* note 23, ¶ 4.4.

206. Tuna-Dolphin II, *supra* note 177, ¶ 3.35. *See also id.* ¶ 3.71 (containing argument by same parties that article XX(a) be interpreted narrowly); Tuna-Dolphin I, *supra* note 23, ¶ 3.50 (containing argument by the Mexican representative that the U.S. position on article XX would permit a government to ban imports of pharmaceuticals in order to protect animals used in laboratory tests).

207. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 8–11, 213 U.N.T.S. 221, 230-32.

208. Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, art. 30, 298 U.N.T.S. 3, 26 [hereinafter Treaty of Rome].

209. *Id.* art 36.

210. *Id.*

211. Handyside v. United Kingdom, 1 Eur. H.R. Rep. (ser. A) 737 (1980).

victed by a United Kingdom court of an obscenity violation, complained to the ECHR that his conviction violated article 10 (freedom of expression) of the Convention for the Protection of Human Rights. The United Kingdom and the European Commission on Human Rights defended the conviction on the grounds that the obscenity law was necessary for the protection of public morality. The ECHR ruled against Handyside. Noting that there was no uniform European conception of morals within the contracting states, the ECHR declared that "[t]he view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject."[212] The ECHR held that article 10 "leaves to the Contracting States a margin of appreciation" because "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[213]

The first case to consider the geographic reach of article 36 of the Treaty of Rome was *Dassonville* in 1974.[214] Dassonville was charged by Belgian authorities with importing and attempting to sell Scotch whisky without a document from British customs authorities certifying the right to use this designation in Belgium. The Scotch had been bought in France. Dassonville claimed that the Belgian law violated article 30 of the Treaty of Rome as a measure having equivalent effect of a quantitative restriction. At issue was whether the Belgian law could be justified under article 36 which provides an exception for restrictions on imports for the protection of public health and for the protection of industrial and commercial property. The European Court of Justice (ECJ) ruled that it could not be justified. The ECJ did not decide whether the Belgian law met one of the exceptions in article 36; instead, the ECJ took a shortcut by ruling that the Belgian law could not qualify under article 36 because it was "arbitrary discrimination or a disguised restriction on trade" between members of the European Community.[215]

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212. *Id.* ¶ 48, at 753.

213. *Id.* ¶ 48, at 753-54.

214. Case 8/74, Procureur du Roi v. Benoît and Dassonville, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974).

215. *Id.* ¶ 7, at 851. The Court implies that direct importers from the United Kingdom would be in a position to satisfy the Belgian law, while importers from France would not.

In his statement to the ECJ, the Advocate General suggested that governments may justify an action under article 36 "only for the purpose of the protection of their own interests and not for the protection of the interests of other states."[216] Thus, for the protection of commercial property, it would be only the country of origin (that is, the United Kingdom) that could rely upon article 36, not the country of importation (that is, Belgium). To elucidate his position, the Advocate General further suggested that a government could not justify restrictions on exports for the protection of public health in the destination country. Summing up, the Advocate General said that "Article 36 allows every State the right to protect exclusively its own national interests."[217]

The opinion of the Advocate General is notable because it squarely addresses the question of whether public policy exceptions in a trade treaty can be outwardly-directed. The opinion, however, sheds little light on the interpretation of article XX(a). Three observations support this conclusion. First, the moral exception played no role in *Dassonville.* Second, the opinion is from the Advocate General, not the ECJ. Third, the ECJ did not seem to rely upon this aspect of the Advocate General's opinion. In apparent support of the Advocate General's opinion, in 1977, the European Commission took the view that a member state which bans cruelty in the rearing and slaughtering of poultry may not ban imports from other member states which apply less stringent rules. The Commission argued that any affront to public morals occurs solely in the country where the cruel treatment takes place.[218]

There are two decisions of the ECJ that do address the moral exception in article 36.[219] Both decisions relate to pornography and, thus, deal with an inwardly-directed application of article 36. In both cases, the importer claimed that a U.K. law was a violation of article 30 of the Treaty of Rome. In the 1979 case, *Henn and*

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216. *Id.* ¶ 5, at 860.

217. *Id.* For a contrary view, see Rolf Wägenbaur, *Vorbemerkung zu den Artikeln 30 bis 37, in* KOMMENTAR ZUM EWG-VERTRAG 233, 291 (Hans von der Groeben et al. eds., 3rd. ed. 1983) (suggesting that article 36 would permit a Member State to ban the importation of an endangered species from outside its territory).

218. PETER OLIVER, FREE MOVEMENT OF GOODS IN THE E.E.C. UNDER ARTICLES 30 TO 36 OF THE ROME TREATY 180 n.78 (2d ed. 1988).

219. *See generally* Chase G. McClister, *Prohibition of Obscene Imports in the United Kingdom—A Violation of Article 36 of the Treaty Establishing the European Community?*, 13 DICK. J. INT'L L. 329 (1995) (discussing the *Henn and Darby* and *Conegate* decisions).

Darby,[220] the ECJ accepted the argument that the import ban was allowed by the article 36 public morality exception. In the 1986 case, *Conegate*,[221] the ECJ rejected the moral exception defense.

Henn and Darby were arrested for importing films and magazines that were "indecent or obscene" in violation of the Customs Consolidation Act of 1876. In their defense, they asserted that the import ban violated article 30 of the Treaty of Rome and was not permitted by the article 36 exception because the United Kingdom did not enforce the same standard of public morality throughout its territory. In many parts of the United Kingdom, only obscene matter was banned and less offensive "indecent" matter was permitted. The ECJ stated that "[i]n principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory."[222] With regard to the circumstances of the case, the ECJ ruled that "[t]he fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States."[223] The ECJ further explained that a morality-based import ban would not constitute "arbitrary discrimination or a disguised restriction on trade" in the absence of lawful domestic trade in the same goods.[224] Perceiving that the pornography was of a nature that "on a comprehensive view" trade in it would be unlawful throughout the United Kingdom, the ECJ denied Henn and Darby's claim.[225] In his *Henn and Darby* opinion, the Advocate General stated that

220. Case 34/79, Regina v. Henn and Darby, 1979 E.C.R. 3795, 1 C.M.L.R. 246 (1979).

221. Case 121/85, Conegate Ltd. v. Her Majesty's Customs and Excise, 1986 E.C.R. 1007, 1 C.M.L.R. 739 (1986).

222. Henn and Darby, 1979 E.C.R. ¶ 15, at 3813.

223. *Id.* ¶ 16, at 3813.

224. *Id.* ¶ 20, at 3815.

225. *Id.* ¶ 21, at 3815. *See* LAURENCE W. GORMLEY, PROHIBITING RESTRICTIONS ON TRADE WITHIN THE EEC—THE THEORY AND APPLICATION OF ARTICLES 30–36 OF THE EEC TREATY 126–28 (1985); OLIVER, *supra* note 218, at 182–83 (criticizing this finding and this decision). David O'Connor takes this criticism further by complaining that the ECJ "conceded extravagant power to each Member State" by placing no check "on the extent to which a Member State can arbitrarily invoke the public morality clause based on the Member State's own, often obscure, laws." David O'Connor, *Limiting "Public Morality" Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union*, 22 BROOK. J. INT'L L. 695, 718 (1997). For example, he worries that Ireland could ban the importation of contraceptives. *Id.* at 719. O'Connor proposes that the Commission issue a Public Morality Directive setting a "basic bandwidth" for morality throughout the Union so that article 36 cannot be abused. *Id.* at 727–33.

the concept of "public morality" is not one that can be made "the subject of objective assessment, or of Community-wide definition. It is a matter of individual opinion, rather than of expert opinion."[226] The Advocate General's view seems to have been influenced by *Handyside* from which he quotes.

The most recent article 36 morality case, *Conegate*, picks up where *Henn and Darby* left off. When Conegate sought to import life-size rubber dolls of women, they were seized by British authorities as being "indecent or obscene" in violation of the 1876 Act. Conegate raised the same defense as Henn and Darby, but the facts were more in his favor. There was generally no ban on the manufacture or sale of such dolls in the United Kingdom (except on the Isle of Man). Instead, there was a ban on mailing them, restrictions on their public display, and restrictions on their sale to minors. Distinguishing this case from *Henn and Darby*, the ECJ clarified the proper use of article 36. Explaining that it was not necessary that domestic manufacture and marketing (of products whose importation is prohibited) be banned throughout a nation's territory, the ECJ held that "it must as least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products."[227] Laws applying to rubber dolls failed this test. In his opinion, the Advocate General postulated that it was up to each state "to lay down their own standards of public morality" since "attitudes vary from place to place and, indeed, from time to time."[228]

In summary, several useful principles can be extracted from the European adjudication. First, there is the declaration in *Handyside* that moral requirements vary from time to time and from place to place. Second, there is the ECJ judgment in *Henn and Darby* that "[i]n principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory."[229] Third, there is the ECJ judgment in *Conegate* that article 36 should not extend to a situation where the import ban covered much more than the domestic ban. Together these judgments might counsel that WTO members should broadly define morality

226. Henn and Darby, 1979 E.C.R. at 3821 (Opinion of Mr. Warner).
227. Conegate, 1986 E.C.R. ¶ 17, at 1023.
228. *Id.* at 1010 (Opinion of Sir Gordon Slynn).
229. Henn and Darby, 1979 E.C.R. ¶ 15, at 3813.

under GATT article XX(a) subject to a limitation that an equivalent restriction be applied to domestic production.[230]

The ECJ practice is also relevant to the two issues discussed above concerning the type of behavior which implicates public morals and the identity of those individuals whose morals may be protected. The ECJ practice shows that products related to sex are core concerns of public morality. The ECJ practice is less helpful in defining whose morals can be protected. Although not authoritative, the opinion of the Advocate General in *Dassonville* is noteworthy in seeking to limit article 36's scope to those actions a state takes "exclusively its own national interests," and "not for the protection of the interests of other States."[231]

Nevertheless, it should be noted that there are important reasons why European Community jurisprudence is not easily applicable to the WTO context. The European Community is a customs union and, as such, will demand fewer barriers to intra-community trade than might be acceptable in the external trade of the Community or in non-Community trade. Furthermore, the Community has the power to harmonize certain standards as a way of avoiding disputes involving inconsistent national laws.[232] By contrast, the WTO lacks such authority.

III. IMPLEMENTING THE GATT MORAL EXCEPTION

In the first WTO dispute decision, the U.S. *Gasoline* case, the panel used a three-prong test to determine whether a measure qualified for article XX(b).[233] First, does the policy underlying the trade measure fall within the range of policies in article XX(b)? Second, is the use of the trade measure "necessary" to fulfill the policy objective? Third, is the measure applied in conformity with the article XX headnote? Given the semantic similarity of GATT articles XX(a) and (b), it seems likely that future panels will use the same framework for an article XX(a) defense.

The range of policies covered by article XX(a) would seemingly, at least, include slavery, weapons, narcotics, liquor, pornography,

230. The headnote of GATT article XX states that measures should not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. GATT, *supra* note 1, art. XX.

231. Dassonville, 1974 E.C.R. ¶ 5, at 860.

232. *See* Treaty of Rome, *supra* note 208, art. 100.

233. World Trade Organization, Report of the Panel in *United States—Standards for Reformulated and Conventional Gasoline, Report of the Panel*, 35 I.L.M. 274, 296 ¶ 6.20 (1996).

religion, compulsory labor, and animal welfare. Other policies could also be included as it seems likely that panels would follow European jurisprudence and not second-guess the moral preferences of the government taking the measure.[234] For reasons of judicial economy, issues that fall more squarely under another GATT exception might not be considered under article XX(a). For example, importation of prison-made goods is covered under article XX(e). Trade in harmful drugs is covered under article XX(b). Trade in weapons is covered under article XXI.

The issue of "whose morality" would likely arise under the second prong which explores the necessity for the trade measure. Import measures to safeguard the morals of a domestic population would probably receive the lightest scrutiny. For example, if a strict Moslem country banned liquor imports, that would probably pass the necessity test.[235] Panels would not ask whether particular rules of the Moslem religion are necessary or whether the government should tolerate drinking by non-Moslems. Similarly, an import ban on heavy metal CDs to protect children would probably pass muster. Panels would probably not apply a rational basis test.

It is interesting to note that in the *U.S. Alcoholic Beverages* case, the U.S. government suggested that different tax treatment of high and low alcohol beer could be justified by article XX(a).[236] The Canadian government maintained that such differential treatment was not necessary to protect public morals since the consumer could get drunk from low-alcohol beer.[237] The panel did not address this point as it found the tax treatment valid under article III.[238]

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234. *See* Handyside v. United Kingdom, 1 Eur. H.R. Rep. (ser. A) 737, 753 (1979-80) (stating that "the requirements of morals varies from time to time and from place to place"); Henn and Darby, 1979 E.C.R. at 3813 (stating that "[i]n principle, it is for each Member State to determine in accordance with its own scale of values . . . the requirements of public morality in its territory"). *But cf.* Feddersen, *supra* note 186, at 112-13 (suggesting that WTO panels set limits on Article XX(a) based on a "common denominator" shared by a majority of WTO members that would leave only a small margin for individual governments to define public morals).

235. *See* Vinod Rege, *GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries*, 28 J. WORLD TRADE, June 1994, at 95, 117 n.20 (suggesting that article XX(a) would permit countries to ban imports based on religious considerations).

236. United States—Measures Affecting Alcoholic and Malt Beverages, *supra* note 185, ¶ 3.125.

237. *Id.* ¶ 3.126.

238. *Id.* ¶ 5.74.

Export measures to safeguard the morals of a foreign population might receive more intense scrutiny. An export ban of a item whose production is prohibited domestically presents no GATT legal problem since presumably there would be nothing to export. The GATT legal problem occurs when a government allows production domestically, but then prohibits exports to some (or all) countries. Several examples of this sort of moral paternalism were noted above—for example, liquor traffic into Africa or Buddha trade out of Thailand. John Jackson has suggested that the GATT would permit export bans to protect the morals of an importing nation.[239] But a WTO panel might consider such measures "extrajurisdictional" following the reasoning of *Tuna-Dolphin I.* The opinion of the Advocate General in *Dassonville* might also be influential.

Import measures to safeguard the morals of a foreign population would receive the strictest scrutiny. Although there is no obvious reason why an interpretive exercise using the Vienna Convention should result in a conclusion that article XX(a) *cannot* be outwardly-directed, one can nevertheless imagine a panel coming to such a conclusion. Panels might be influenced by the unfairness of permitting large nations to use trade measures to pressure smaller ones or allowing protectionist concerns to be characterized as moral ones.

The danger of protectionist abuse is real. Virtually anything can be characterized as a moral issue. At this point, however, it seems premature to worry about overuse of article XX(a). One can imagine nations justifying many import bans as morally-based. Throughout the 50 years of the GATT-WTO system, however, no member state has challenged a morally-based import ban.

Past tendencies of panels to interpret article XX "narrowly"[240] might not be repeated in view of the teaching of the *Hormone* decision. In that decision, the Appellate Body declared that:

> [M]erely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in light of

239. JACKSON, *supra* note 17, at 504.
240. *See supra* text accompanying note 183.

> the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[241]

This might make it hard for future panels to follow either Tuna-Dolphin decision.

Many commentators have expressed the idea that international trade should have a moral baseline.[242] Ambassador Edward A. Laing views "humanitarianism" as "arguably meriting the status of legitimate discrimination" under GATT article XX(a).[243] Economist Richard N. Cooper contends that "[s]urely the international community cannot, and should not be able to, force a country to purchase products the production of which offends the sensibilities of its citizenry."[244] Peter Drucker sees the need for "moral, legal, and economic rules that are accepted and enforced throughout the global economy."[245] Even Henry George, one of the leading free traders of the 19th century, saw a reason for a moral exception when he explained that

> Free trade, its true meaning, requires not merely the abolition of protection but the sweeping away of all tariffs—the abolition of all restrictions (save those imposed in the interests of public health or morals) on the bring-

241. Appellate Body Hormone Decision, *supra* note 81, ¶ 104. The clarification can with reference to an exception in the Agreement on the Application of Sanitary and Phytosanitary Standards, not with reference to GATT exceptions. Yet it would seem that the principle should be the same.

242. *See, e.g.*, Daniel C. Esty, *Trade and Environment Mix*, J. COM., Nov. 7, 1997, at 6A, *available in* LEXIS, News Library, Curnws File (suggesting that absent a moral baseline, public support for continued trade openness cannot be assured). The other side of the coin of whether morality should override trade is whether trade should override morality. Perhaps the most notable episode of trade overriding morality were British-Chinese relations over opium in the mid-19th century. *See* 8 THE NEW ENCYCLOPAEDIA BRITANNICA 967 (15th ed. 1990); *See also* Lawrence Ingrassia, *Britain to Deport Saudi Dissident to Protect Trade*, WALL ST. J., Jan. 5, 1996, at A6.

243. Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WISC. INT'L L.J. 246, 332 (1996). Laing, who was Belize's ambassador to the United Nations, notes the practice of linking moral and humanitarian concerns in pre-GATT trade treaties. *Id.*

244. RICHARD N. COOPER, ENVIRONMENT AND RESOURCE POLICIES FOR THE WORLD ECONOMY 30 (1994). Cooper points out that such import restrictions may violate GATT rules and, if so, the country using the trade measure would owe compensation. *Id.* at 31.

245. Peter F. Drucker, *The Global Economy and the Nation-State*, 76 FOREIGN AFF. 159, 169 (Sept./Oct. 1997).

> ing of things into a country or the carrying of things out of a country.[246]

Other commentators question the interruption of trade for moral reasons. For example, economists Jagdish Bhagwati and T.N. Srinivasan oppose unilateral governmental action to suspend trade access "unless one's choice of ethical concerns is adopted by others."[247] They cite three main reasons: first, the intransitivity of values would allow each country to sanction the other; second, the asymmetry of market power would give larger countries more coercive power; and third, persuasion and private action should be used to spread values.[248] Another argument against interrupting trade is that commerce itself can raise public morals among participating countries.[249]

The issue of whether the trade measure is "necessary" would be considered under the second prong. The WTO *Gasoline* panel examined whether there were alternative measures "reasonably available" that were consistent or less inconsistent with the GATT.[250] How this would play out in the article XX(a) context would depend upon the facts of the dispute.

The third prong would consider the article XX headnote, namely "the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised discrimination on international trade...." In its decision in the *Gasoline* case, the Appellate Body provided the first extensive interpretation of the headnote in either GATT or WTO jurisprudence. According to the Appellate Body, the terms *arbitrary discrimination*, *unjustifiable discrimination*, and *disguised restriction* "impart meaning to one another," and the considerations pertinent to ascertaining discrimination are also

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246. HENRY GEORGE, PROTECTION OR FREE TRADE 286 (Schalkenbach Foundation 1991) (1886).

247. Jagdish Bhagwati & T. N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Free Trade?*, *in* 1 FAIR TRADE AND HARMONIZATION, *supra* note 5, at 180.

248. *Id.* at 180–84.

249. *See* John Ball Osborne, *Influence of Commerce in the Promotion of International Peace*, 22 INT'L CONCILIATION 3, 8–9 (1909) (suggesting that commerce raises public morality to the higher level of the two trading partners).

250. United States—Standards for Reformulated and Conventional Gasoline, *supra* note 233, ¶ 6.24. The panel concluded that such alternatives did exist. *Id.* ¶¶ 6.25–6.29.

pertinent to ascertaining a *disguised restriction.*[251] In the *Gasoline* case, the Appellate Body was reviewing an environmental regulation that treated foreign-source gasoline differently than gasoline of domestic origin. The Appellate Body found this difference of treatment to be unjustified.

Many potential uses of article XX(a) would not constitute arbitrary or unjust discrimination. They would be treating foreign products the *same* as domestic products. In *Henn and Darby*, the ECJ explained that a morally-based import ban would not constitute "arbitrary discrimination or a disguised restriction on trade" in the absence of lawful domestic trade in the same goods.[252] Following this logic, a WTO panel might validate a morally-based import ban of a product so long as its production or sale were prohibited domestically. This would apply to products that offend morality (e.g., pornography) and perhaps also to products whose production methods offend morality (e.g., rugs made by indentured children). As Philip M. Nichols has pointed out, in the context of societal values, "it is disingenuous to distinguish between a ban on a product and a ban on a product made in a certain way."[253]

The comparison of the import ban to domestic trade can get complex. When the Reagan Administration banned the importation of Krugerrands, it did not try to limit domestic sale nor did it bar the importation of like gold coins. Would this import ban have qualified under the article XX headnote? It would have failed the *Henn and Darby* test. But the article XX headnote is perhaps more lenient because it hinges on whether there is arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Did the same conditions prevail in South Africa and the United States? Consider another example. The European Commission regulation on leghold traps bans the use of such traps in the Community but does not ban internal sale of fur from animals caught in such traps (that is, both new fur caught il-

251. Appellate Body Gasoline Decision, *supra* note 74, at 629. This conflation of terms is criticized in Arthur E. Appleton, *GATT Article XX's Chapeau: A Disguised 'Necessity' Test?: The WTO Appellate Body's Ruling in* United States - Standards for Reformulated and Conventional Gasoline, 6 REV. EUR. COMMUNITY & INT'L ENVTL. L. 131, 135-36 (1997). *See also* Friedl Weiss, *The consistency of the fur import ban with WTO law, in* TRAPPED BY FURS? THE LEGALITY OF THE EUROPEAN COMMUNITY'S FUR IMPORT BAN IN EC AND INTERNATIONAL LAW 73 (André Nollkaemper ed., 1997) [hereinafter TRAPPED BY FURS] (criticizing the Appellate Body's analysis).

252. Henn and Darby, 1979 E.C.R. ¶ 22, at 3815.

253. Philip M. Nichols, *Trade Without Values,* 90 NW. U. L. REV. 658, 704 (1996).

legally and old fur caught legally). Does this double standard meet the article XX headnote?

Many commentators have expressed concern that the trading system might permit any external trade ban that matched an internal trade ban. For example, Robert Hudec argues that the WTO needs to do more under article XX than screen out economic protectionism. Pointing to U.S. marine mammal laws, Hudec states that "[t]he main problem here is not pure protectionism, but an excess of zeal over what are essentially moral claims."[254] Hudec seems to favor a return to the *Tuna-Dolphin I* panel's opposition to extrajurisdictionality.[255]

Although this Article has focused thus far on the GATT, the continuing vitality of the moral exception should be noted.[256] For example, the Australia–New Zealand Closer Economic Relations Trade Agreement (of 1983) contains an exception "to protect public morals."[257] The Agreement for ASEAN Free Trade Area (of 1992) declares that nothing in the agreement shall prevent a member state from taking action which "it considers necessary" for the protection of public morals.[258] The North American Free Trade Agreement (of 1992) incorporates GATT article XX(a) by reference.[259] Future jurisprudence under the WTO and these agreements can be expected to influence each other.

To illustrate how article XX(a) might be implemented, it may be helpful to consider two current controversies—the new E.U. ban on fur from countries permitting leghold traps and the new U.S. ban on products made by indentured children. These provisions will be discussed briefly below.

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254. Hudec, *supra* note 22, at 149. *Cf.* Chang, *supra* note 179, at 2172–75 (explaining that the article XX headnote provides sufficient discipline).

255. Hudec, *supra* note 22, at 152–54.

256. One counterexample is the Multilateral Agreement on Investment, now being negotiated in the Organization for Economic Co-operation and Development. The most recent draft does not contain a moral exception. Multilateral Agreement on Investment, Oct. 1, 1997 (draft) (visited Feb. 1, 1997) <http://www.islandnet.com/~ncfs/maisite/9710-p01.htm>.

257. Australia–New Zealand: Closer Economic Relations Trade Agreement, Mar. 28, 1983, art. 18(b), 22 I.L.M. 945, 970 (1983).

258. Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, art. 9, 31 I.L.M. 513, 520 (1992).

259. North American Free Trade Agreement, Dec. 17, 1992, art. 2101(1), 32 I.L.M. 605, 699.

A. *Animals Caught by Leghold Traps*

European Commission action to protect animals from leghold traps began about a decade ago.[260] In 1989, the Commission presented a proposal for a Council Regulation. In 1991, the Council enacted a regulation to prohibit the use of leghold traps in the European Community and to ban the importation of pelts and manufactured goods of certain wild animal species unless the country of origin has banned leghold traps or unless the trapping methods used meet "internationally agreed humane trapping standards."[261] The import ban was originally scheduled to go into effect in 1995 in order to allow time for exporting countries to raise their standards. The effective date was postponed as the Commission negotiated with the major supplying countries—Russia, Canada, and the United States.[262] At the same time, the U.S. and Canadian governments threatened a lawsuit in GATT if the Commission put its regulation into effect.[263] In 1997, the Commission reached agreements with Canada, Russia and the United States to phase out the use of leghold traps. The Commission deemed these agreements sufficient to exempt these countries from the ban which finally went into effect in December 1997.[264]

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260. *A Brief History of the Leghold Traps Dispute, in* TRAPPED BY FURS, *supra* note 251, at 91–93. The moral problem of leg-hold traps has been recognized for many decades. For example, in 1926, this topic was put on the agenda of the International Association of Game, Fish and Conservation Commissioners. *See* PROCEEDINGS OF THE NINETEENTH CONVENTION OF THE INTERNATIONAL ASSOCIATION OF GAME, FISH AND CONSERVATION COMMISSIONERS (1926). The delegate from the state of Connecticut suggested educating the women not to demand furs that are caught in steel traps. *Id.* at 63. The delegate from the state of New York noted that the Humane Society wanted a ban on the use of steel traps. *Id.* at 64. The delegate from the Izaak Walton League countered that too much time was being spent on the issue of cruelty when the real issue was the conservation of wildlife. *Id.* at 65-66.

261. *See supra* note 36 and accompanying text.

262. *Fur Ban Threat Looms as EU Approves Standard Banning Animal Leg-Hold Traps*, INT'L TRADE. REP., July 23, 1997, at 1265, *available in* LEXIS, BNA File, Intrad File; *EU Pressing for Negotiating on Humane Trapping Standards*, INSIDE U.S. TRADE, July 19, 1996, at 14; *Hunting for a Kinder Kill*, FIN. TIMES, Dec. 13, 1995, at 15, *available in* LEXIS, News Library, Fintme File; *Trappers Hit EU Plan to Bar Some Fur Imports*, J. COM., Oct. 31, 1995, at 5A, *available in* LEXIS, News Library, JOC File. Disappointed by these delays, the Dutch government implemented the ban in 1996. André Nollkaemper, *The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban"on Furs from Animals Taken by Leghold Traps*, 8 J. ENVTL. L. 237, 243–44 (1996).

263. *Kantor Says U.S. Will Join Canada Leghold Trap Challenge of EU in WTO*, INSIDE U.S. TRADE, Aug. 25, 1995, at 1; *see also GATT Threatens EU Animal Laws*, VEGETARIAN TIMES, Feb. 1996, at 16 (stating that the "United States is threatening GATT action if the prohibition isn't lifted this year").

264. *EU Approves Trapping Standards Deal After U.S. Persuades Germany*, INSIDE U.S. TRADE, Dec. 19, 1997, at 4.

Although no trade clash appears imminent over leghold traps, the controversy has not ended. The agreements with Canada, Russia, and the United States could fall apart if these countries do not phase out leghold traps. The U.S.–E.U. agreement looks especially shaky as it is based on an agreement to disagree.[265] Moreover, other supplying countries might decide to lodge a WTO complaint.

The only grounds for GATT legality of the fur import ban would be GATT article XX(a). The import ban would violate GATT article XI because it is a quantitative restriction and GATT article I if it treats exporting countries differently depending on whether they regulate leghold traps. Since the use of traps is not an issue of animal health, article XX(b) could not be used.[266]

A WTO panel hearing such a case would first consider whether the policy underlying the import ban—preventing cruelty to animals—falls within the range of policies covered by article XX(a). The answer would surely be affirmative. Suppose no leghold traps were produced in Europe. The European Commission could ban the importation of such traps in order to prevent them from being used within the Community. Article XX(a) could then be used to defend that inwardly-directed import ban.

In the second prong of its analysis, a WTO panel would inquire as to the necessity of the E.U.'s import ban. The challenging government, say the United States, would argue that article XX(a) cannot be outwardly-directed and so the import ban fails the necessity test. Alternatively, the U.S. government might follow the *Tuna-Dolphin II* decision by arguing that the E.U.'s measure seeks to force the United States to change its trapping law. The U.S. government might also argue that an import ban is unnecessary because negotiation is more effective than confrontation.

The defending government would counter that article XX(a) does allow the importing nation to respond to international issues. It would point to the longtime use of outwardly-directed import restrictions as context for understanding what the drafters of article XX(a) intended. How a panel would evaluate these arguments remains to be seen.

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265. *Id.* (noting the U.S. position that it can derogate from its commitment to phase out leghold traps and the E.U. position that the U.S. government agreed not to derogate).

266. *Cf.* Peter V. Michaud, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 355, 372–73 (1997) (suggesting that the panel might conclude that limiting the amount of pain to the doomed animal might qualify as a health measure).

Both sides would probably appeal to the principle of sovereignty. The U.S. government might argue that how animals are treated within its territory is a matter of American sovereignty. The European Commission, however, could counter that sovereignty implies that a state should be able to exercise control over what is imported across its borders.

The proposition that article XX(a) can never be outwardly-directed is seemingly false.[267] Although the issue has never been litigated in the GATT context, one can imagine an outwardly-directed import ban that would surely be permitted.[268] Suppose the European Commission became so obsessed with animal rights that it banned the importation of *all* animal fur and ended all domestic trapping. It is hard to imagine a panel holding such a law to be a GATT violation. It would surely be allowed under article XX(a).

If a government can ban all fur imports, shouldn't it be able to ban fur caught in leghold traps? In a thoughtful analysis of the leghold trap dispute, André Nollkaemper suggests that article XX(a) would permit an import ban on implicated furs.[269] According to Nollkaemper, "[t]he ordinary meaning of the text of Article XX does not suggest that, when drafting the GATT, states intended to give up their rights to protect moral concern over animals irrespective of geographic considerations."[270] Another commentator, Stuart Harrop, agrees that a carefully drafted leghold-trap-caught fur import ban could survive article XX(a) scrutiny.[271]

Other scholars have disagreed that import bans can be linked to the production process in another country. These arguments are

267. *See supra* text accompanying note 205 (referring to argument by Australian government that Article XX(a) could justify measures regarding inhumane treatment of animals if such measures applied equally to domestic and foreign animal products).

268. One scholar would distinguish between outwardly-directed import bans linked to the product versus those linked to the production process. He believes that the Tuna-Dolphin decisions, which he supports, only implicate import restrictions linked to the production process. Thus, it would follow from his view that WTO acceptance of import restriction on all fur would not contradict the teaching of the Tuna-Dolphin panels. *See* Schoenbaum, *supra* note 23, at 280, 291, 312

269. Nollkaemper, *supra* note 262, at 245. *But cf.* Feddersen, *supra* note 186, at 117 & n.197 (stating that article XX does not permit trade measures which take effect in the territory of another country).

270. Nollkaemper, *supra* note 262, at 248 (internal reference omitted). *See id.* at 250 (suggesting that the location of the fur-bearing animals being protected should not be a GATT issue).

271. Stuart Harrop, *Reconciling animal welfare and trade law*, *in* TRAPPED BY FURS, *supra* note 251, at 82.

based on the premise that GATT rules should be interpreted so as to be consistent with broad principles of international law. For example, Shinya Murase argues that the E.U.'s fur ban would violate international rules as shown by an International Law Association resolution regarding the extraterritorial application of antitrust laws.[272] Thomas Schoenbaum argues that permitting unilateral import bans linked to the production process would encourage violations of fundamental principles of public international law.[273]

Although they postulate that a hypothetical leghold trap law could be GATT-consistent, Nollkaemper and Harrop doubt that the Commission's regulation would meet an article XX(a) necessity test. Nollkaemper says that its "non-clarity, inconstancy and over-inclusiveness jeopardize its legality."[274] The problem of over-inclusiveness is most troubling. As Nollkaemper points out, the current Commission regulation would embargo pelts acquired in a humane way if the exporting government had not enacted the regulatory structure desired by the Commission.[275] Harrop criticizes the list of species covered by the regulation as including only those in the northern hemisphere.[276]

One way to narrow the article XX(a) window would be for panels to insist that the trade measure be focused as tightly as possible. Thus, a trade ban on fur caught with a leghold trap would be tighter than a ban on fur from *countries* that permit leghold traps. To the extent that the trading system is concerned about the coerciveness of trade bans, it would seem that bans linked to foreign industrial practices would be less worrisome than bans linked to foreign government policies.

The third prong of a WTO panel's analysis would involve the article XX headnote. There would be a problem if the Commission were imposing a tougher standard on foreign trappers than on European trappers. This does not seem to be the case. Under this prong, the panel may also inquire into whether the particulars of the Commission's regulation are arbitrary and whether the dis-

272. Shinya Murase, *Perspectives from International Economic Law on Transnational Environmental Issues*, 253 RECUEIL DES COURS 353-54, 354 n.134. Murase posits that an assertion of jurisdiction based merely on substantial domestic effects of a foreign act does not reflect existing international rules. *Id.* at 353. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 403, 415 (1986).

273. Schoenbaum, *supra* note 23, at 280, 291.

274. Nollkaemper, *supra* note 262, at 247 (citations omitted).

275. *Id.* at 253–54.

276. Harrop, *supra* note 271, at 84.

guised purpose of the regulation was to give a competitive advantage to European trappers.

The accord reached between the Commission and the U.S. government suggests that neither party sought WTO litigation.[277] For one thing, trade officials would have to switch sides from their position in the Tuna-Dolphin cases.[278] This inconsistency could be embarrassing. Furthermore, although the U.S. government probably felt confident that it could win on legal grounds in Geneva, it knew that it would lose political ground in Washington if the animal welfare groups joined the anti-WTO coalition.

B. *Products Made by Indentured Children*

In 1997, the U.S. Congress forbade border officials from allowing in products made by indentured child labor.[279] This is the first U.S. trade ban specifically aimed at helping children in other countries.[280] If implemented by the Clinton Administration,[281] it seems likely to provoke WTO litigation.

The import ban could be defended under article XX(a) or (b). Since the products of children working voluntarily would continue to be permitted, a health defense under article XX(b) would be

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277. *See* James Stone, *Resolving the animal welfare and legal issues of the EU fur import prohibition; the view of Canada, in* TRAPPED BY FURS, *supra* note 251, at 27 (noting that this is a WTO case nobody wants).

278. *See supra* text accompanying notes 193-194.

279. *See supra* note 31 and accompanying text; *Congress Bans Imports Made by Indentured Children*, DAILY REC. (Baltimore, MD), Oct. 7, 1997, at 2, *available in* LEXIS, News Library, Curnws File.

280. *Children and Commerce; Countries and Consumers Can Combat Child-Labor Abuses*, PITTSBURGH POST-GAZETTE, Nov. 14, 1997, at A38, *available in* LEXIS, News Library, Curnws File. In 1913, the U.S. Senate added an amendment to the pending Underwood Tariff to bar imports made by children under 14 working in countries where there are no child labor laws. 50 CONG. REC. 3955 (1913). Senator Elihu Root opposed the measure saying: "I do not think we have any right to attempt to enforce our policy upon the domestic affairs of a foreign country by refusing to receive their goods in the ordinary methods of commerce unless they conform to our ideas rather than to their own." *Id.* Senator Borah supported the amendment saying:

> As I view the statute, it was not intended to enforce, and of course no one could enforce, upon a foreign country a policy that that country did not desire to adopt; but we have a right to say whether or not we shall avail ourselves of goods manufactured in establishments where children 5 and 6 years of age are worked from 10 to 12 hours a day.

Id. at 3956. The amendment was deleted during conference. *Id.* at 5229.

281. *See* Pamela M. Prah, *Advocates Complain Inter-Agency Squabble Has Delayed Action on Child Labor Ban*, DAILY LAB. REP., Dec. 24, 1997, at A2.

awkward.[282] Therefore, the best defense would be article XX(a) on the grounds that indenturing children is immoral.

A WTO panel hearing such a case would first consider whether the policy underlying the import ban—helping indentured children—fell within the range of policies covered by article XX(a). The answer would surely be affirmative. Since the *Tuna–Dolphin II* panel did not question the policy of protecting dolphins, one cannot imagine a future panel trying to explain why children are less worthy of protection.[283]

Under the second prong of the analysis, a WTO panel would consider the import ban's necessity. The challenging country, say India, would argue that article XX(a) cannot be outwardly-directed and so an import ban fails the necessity test. Alternatively, India might follow the *Tuna-Dolphin II* decision by arguing that the U.S. measure seeks to force India to change its child labor law. India might also argue that an import ban is unnecessary because negotiation is more effective than confrontation.[284]

To defend the import ban, the U.S. government could marshal a strong additional argument supporting GATT legality. In a recent article, Janelle M. Diller and David A. Levy suggest that "well-established rules of international law compel the harmonization of international trade rules with international labor and human rights norms that prohibit the most exploitative, or extreme, forms of child labor."[285] Such extreme forms include debt bondage.[286] From this perspective, it would be the duty of a WTO panel to interpret the GATT exception in light of "common commitments under *jus cogens*."[287] Diller and Levy assert an even stronger imperative:

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282. Diller & Levy argue that article XX(b) could be used to defend a restriction on imports made using exploitative child labor. Diller & Levy, *supra* note 34, at 683. This is a broader category than just indentured labor, and thus such an article XX(b) defense is more plausible.

283. *See id.* at 682 (pointing out that unlike country-specific policies concerning dolphins, laws against exploitative child labor have been incorporated in widely ratified human rights treaties).

284. *See* James P. Kelleher, Note, *The Child Labor Deterrence Act: American Unilateralism and the GATT*, 3 MINN. J. GLOBAL TRADE 161, 188–94 (1994) (suggesting that the U.S. do more to negotiate improvements with other countries).

285. Diller & Levy, *supra* note 34, at 664 (citation omitted).

286. *Id.* at 666. *See also id.* at 669 (noting that the Supplementary Convention on the Abolition of Slavery prohibits debt bondage); *id.* at 671 (noting that "extreme forms of child labor" violate the Forced Labor Conventions of the International Labour Organization); *id.* at 673 (noting that customary norms of human rights law prohibit debt bondage).

287. *Id.* at 678. *See also id.* at 694 (suggesting that international law requires that trade undertakings be maintained only to the extent of consistency with fundamental norms).

> Maintenance of the international trade regime to the extent of consistency with international obligations respecting extreme forms of child labor may require WTO contracting parties to ensure that specific products imported for their domestic markets, or exported from their territory, are not produced with such child labor.[288]

The third prong of a WTO panel's analysis would be an investigation into the import ban's compatibility with the article XX headnote. There would be a problem if the U.S. government were imposing a tougher standard on foreign indentured labor than on U.S. indentured labor. But there is little (if any) indentured child labor in the United States. There would also be a problem if the U.S. Customs Service treated some nations better than others.

C. *Internationalizing Trade Morality*

Although a unilateral determination of morality may be appropriate for inwardly-directed concerns, it is too open-ended for outwardly-directed concerns. Some method to determine the legitimacy of a moral claim is needed in order to ensure that the moral exception does not begin to swallow the rules. Allowing each government to restrict imports based on its own definition of morality could disrupt trade and allow imperialism by countries with market power.

One response would be to forbid the use of article XX(a) as a justification for trade measures with outwardly-directed purposes. As shown in Parts II and III, however, this interpretation would seem to be unjustifiable under the Vienna Convention and would probably not be accepted by key WTO members. Moreover, it could widen the gulf between the trading system and public opinion.

The best solution would be to internationalize article XX(a). Rejecting the extremes of "anything goes" and "no outwardly-directed," the WTO should use international human rights law to ascribe meaning to the vague terms of article XX(a). Thus, the moral exception could validate trade actions based on international norms while rejecting trade actions based on nationalistic

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288. *Id.* at 695. *See also id.* at 689 (suggesting that other international obligations held in common by WTO parties might support a determination of GATT-legality of a trade measure that might otherwise be deemed a GATT violation); Esty, *supra* note 11, at 119 n.21 (stating that, "while it may not be GATT's place to make moral judgments, GATT should accept and enforce moral bounds derived elsewhere").

aims. This solution would recognize the symmetry in our pursuit of both global commerce and global values. It would be a bold statement that the WTO is not predicated on morally-blind trade.

IV. OTHER MORAL EXCEPTIONS IN THE WTO

In addition to the GATT moral exception written in 1947, other WTO agreements contain a similar moral exception. These include the agreements on services, procurement, and intellectual property. The Agreement on Technical Barriers to Trade does not contain a moral exception; nor does the Agreement on Textiles and Clothing.

The General Agreement on Trade in Services provides for exceptions. The headnote for these exceptions is similar to article XX of the GATT. The first exception in the Services Agreement is provided for measures "necessary to protect public morals or to maintain public order."[289] In the area of financial services, this exception could be used to justify national measures to control money laundering.[290] In the area of telecommunications, this exception could be used to justify national legislation blocking sex-related services via telephone or internet.[291] In the area of tourism, this exception could be used to justify measures against sex tourism.[292]

The Agreement on Government Procurement provides public policy exceptions.[293] The introductory clause is similar to the GATT article XX headnote. The first listed exception is for measures "necessary to protect public morals, order or safety."[294] One can imagine many outwardly-directed uses of this provision. It is difficult to imagine an inwardly-directed use.

The Agreement on Trade-Related Aspects of Intellectual Property Rights requires governments to make patents available for

289. WTO General Agreement on Trade in Service, art. XIV(a), 33 I.L.M. 1167, 1177 (1994).

290. Matthew B. Comstock, *GATT and GATS: A Public Morals Attack on Money Laundering*, 15 NW. J. INT'L L. & B. 139, 166 (1994).

291. *See* Elizabeth Kastor, *Sleaze from Overseas*, WASH. POST, July 25, 1994, at D1.

292 Michael Pina, *Shame of the industry: organized sex tours; includes related article on the lucrative aspect of such tours*, TRAVEL WEEKLY, Apr. 22, 1996, *available in* LEXIS, News Library, Asapii File.

293. WTO Agreement on Government Procurement, art. XXIII(2), *available in* LEXIS, ITrade Library, GATT File.

294. *Id.*

new inventions to nationals of WTO members.[295] Governments may exclude from patentability any invention if preventing the commercial exploitation of such invention is "necessary to protect *ordre public* or morality."[296] This provision might be invoked to justify a refusal to grant patents for the products of fetal research or genetic engineering.[297]

So far, none of these provisions have been the subject of WTO adjudication. The same legal issues discussed in Part III would arise. For example, may the moral exception in the Procurement Agreement be used to justify not buying products from Myanmar? May patents be denied in Country X because of fetal research in Country Y? These issues may ultimately be decided by WTO panels.

V. CONCLUSION

This Article begins a dialogue of interpreting GATT article XX(a). We started by listing and categorizing numerous trade laws, treaties, and actions that had or have a moral motivation. Next, we sought to interpret article XX(a) using the framework of the Vienna Convention which a future WTO panel would use. We explored the history of article XX(a) in a detailed way because the antecedents to GATT article XX(a) have never been assembled. Then we used the standard article XX jurisprudential framework to analyze potential uses of article XX(a), including two trade measures which are currently controversial. Finally, we made note of the moral exception in other WTO agreements.

Although long quiescent, GATT article XX(a) could receive considerable attention in the years ahead. The examples of leghold traps and indentured child labor show that WTO panels will be confronted with difficult arguments that will challenge the past insularity of the trade regime. Efforts will surely be made to limit the scope of article XX(a) and like provisions to inwardly-directed concerns. It will be argued that morality must stop at the border. In an increasingly interdependent global community, however, the linkages between morality and economic policy will become harder to overlook. In the words of Lucia Ames Mead,

295. WTO Agreement on Trade–Related Aspects of Intellectual Property Rights, art. 27.1, 33 I.L.M. 1197 (1994).

296. *Id.* art. 27.2. This article further states that there must be more rationale for the exclusion than the fact that exploitation is prohibited by law. *Id.*

297. *See* O'Connor, *supra* note 225, at 724–25.

"[w]orld righteousness and world economic welfare must be shown to be compatible."[298]

298. LUCIA AMES MEAD, LAW OR WAR 86 (Garland Publishing Inc., 1971) (1928). Mead was a noted suffragist and peace activist. *See also* IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch, in* KANT'S POLITICAL WRITINGS 93, 107-8 (Hans Reiss ed., Cambridge Univ. Press 1979) (1795) (stating that "[t]he peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*").